*To be argued by*
ROBERT D. PETTY.

# Supreme Court of the United States

OCTOBER TERM, 1924.

No. 349.

REUBEN WELLER,
*Plaintiff-in-error,*

*against*

THE PEOPLE OF THE STATE OF NEW YORK,
*Defendant-in-error.*

## BRIEF FOR DEFENDANT-IN-ERROR.

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### Statement.

This case involves the Constitutionality of Section 168 of the General Business Law of the State of New York—(added by Chap. 590, Laws of 1922)—prohibiting the reselling of theatre tickets without a license.

It comes before this Court on a writ of error directed to the Court of Special Sessions of the City of New York, in the State of New York, to review a judgment by which the plaintiff-in-error, the defendant below, was sentenced to pay a fine of twenty-five dollars and in default of the payment thereof to stand committed to the City Prison for five days, rendered upon conviction of a misdemeanor—reselling theatre tickets without a license.

The original judgment of conviction was rendered in the Court of Special Sessions on February 16, 1923. An appeal was taken therefrom by the plaintiff-in-error to the Appellate Division of the Supreme Court of the State of New York, First Department, and the judgment of conviction was affirmed (two of the five judges dissenting), on the 30th day of November, 1923 (*People* v. *Weller,* 207 N. Y. App. Div. 337). An appeal was thereupon taken by the plaintiff-in-error to the Court of Appeals of the State of New York and the judgment of the said Appellate Division was affirmed (one of the seven judges dissenting), on February 19, 1924 (*People* v. *Weller,* 237 N. Y. 316).

Upon the affirmance of the judgment of conviction by the Court of Appeals, that Court, in accordance with the practice and procedure of the State of New York (N. Y. Code of Criminal Procedure §§548, 549), remitted the record and proceedings to the Court of Special Sessions of the City of New York, in which Court the original judgment had been rendered, and an order was there entered upon the *remittitur* making the judgment of the Court of Appeals the judgment of the Special Sessions and directing that the original judgment of conviction be enforced and carried into execution and effect (Record, pp. 53, 54, fols. 90-93).

## The Statute Involved.

The General Business Law (L. 1909, chap. 25) was amended by L. 1922, chap. 590, by inserting therein a new article, as follows:

## "ARTICLE X-B.

### Theatre Tickets.

§167. Matters of Public Interest. It is hereby determined and declared that the price of or charge for admission to theatres, places of amusement or entertainment, or other places where public exhibitions, games, contests or performances are held is a matter affected with a public interest and subject to the supervision of the state for the purpose of safeguarding the public against fraud, extortion, exorbitant rates and similar abuses.

§168. Reselling of Tickets of Admission; Licenses. No person, firm or corporation shall resell or engage in the business of reselling any tickets of admission or any other evidence of the right of entry to a theatre, place of amusement or entertainment, or other places where public exhibitions, games, contests or performances are held without having first procured a license therefor from the comptroller. Such license shall be granted upon the payment by or on behalf of the applicant of a fee of one hundred dollars and shall be renewed upon the payment of a like fee annually. Such license shall not be transferred or assigned, except by permission of the comptroller. Such license shall run to the first day of January next ensuing the date thereof, unless sooner revoked by the comptroller. Such license shall be granted upon a written application setting forth such information as the comptroller may require in order to enable him to carry into effect the provisions of this article and shall be accompanied by proof satisfactory to the comptroller of the moral character of the applicant.

§169. Bond. The comptroller shall require the applicant for a license to file with

the application therefor a bond in due form to the people of the State of New York in the penal sum of one thousand dollars, with two or more sufficient sureties, who shall be freeholders within the State of New York, conditioned that the obligor will not be guilty of any fraud or extortion, and will not exact or receive a price for any such ticket or evidence of the right of entry in excess of the price authorized by this article. The comptroller shall keep books wherein shall be entered in alphabetical order all licenses granted and all bonds received by him as provided for in this article, the date of the issuance of such licenses and the filing of such bonds, which record shall be open to public inspection. A suit to recover on the bond required to be filed by the provisions of this article may be brought by the comptroller or on the relation of any party aggrieved in a court of competent jurisdiction and in the event that the obligor named in such bond has violated any of the conditions of such bond, recovery for the full penal sum of such bond may be had in favor of the people of the state.

§170. Revocation of Licenses. In the event that any licensee shall be guilty of any fraud or misrepresentation or shall charge for any ticket a price in excess of the price authorized by this article or otherwise violate any of the provisions of this article or any other law or local ordinance, the comptroller shall be empowered, on giving ten days' notime by mail to such licensee, and on affording such licensee an opportunity to answer the charges made against him, to revoke the license issued to him.

§171. Supervision of Comptroller. The comptroller shall have the power, upon complaint of any citizen or of his own initiative,

to investigate the business, business practices and business methods of any such licensee if in the opinion of the comptroller such investigation is warranted. Each such licensee shall be obliged, on request of the comptroller, to supply such information as may be required concerning his business, business practices or business methods.

§172. Restriction as to Price. No licensee shall resell any such ticket or other evidence of the right of entry to any theatre, place of amusement or entertainment, or other place where public exhibitions, games, contests or performances are given at a price in excess of fifty cents in advance of the price printed on the face of such ticket or other evidence of the right of entry. Every person, firm or corporation who owns, operates or controls a theatre, place of amusement or entertainment, or other place where public exhibitions, games, contests or performances are held shall, if a price be charged for admission thereto, print on the face of each such ticket or other evidence of the right of entry the price charged therefor by such person, firm or corporation.

§173. Violations; Penalties. Every person, firm or corporation who resells any such ticket or other evidence of right of entry or engages in the business of reselling any such ticket or other evidence of the right of entry, without first having procured the license prescribed and filing of a bond required by this article shall be guilty of a misdemeanor. Every person, firm or corporation who violates any provisions of this article shall be guilty of a misdemeanor.

§174. Constitutionality of Article. In case it be judicially determined that any section of this article is unconstitutional or otherwise invalid, such determination shall

not affect the validity or effect of the remaining provisions of the article.

§2. This act shall take effect immediately."

This act became a law April 12, 1922.

## The Information.

The information charged that the defendant "on the 26th day of October, 1922, at The City of New York, in the County of New York, unlawfully did engage in the business of reselling tickets of admission to a theatre and place of amusement and did resell to one John Cunniff, a ticket of admission to a certain theatre and place of amusement called Palace Theatre, without first having obtained the necessary license thereof (*sic*) from the Comptroller of the State of New York as required by law" (Record, p. 2, fol. 3).

## The Facts.

JOHN CUNIFF, a police officer, testified that on the 26th day of October, 1922, he went to the place of business of Reuben Weller, the plaintiff-in-error, at 1560 Broadway, in the Borough of Manhattan, City and County of New York. He further stated:

> "Q. What did you do after entering his place of business? A. I purchased two tickets and paid for them, and I asked him if he was in the business of selling tickets, *and I asked him if he had a license to resell tickets under this law and he said he did not, and I placed him under arrest.*

Q. Did you ask him anything with reference to the law of the State Comptroller? A. I did.

Q. Are these tickets that were purchased by you? A. Yes, sir.

Q. And that he sold you? A. Yes, sir.

Q. How much money did you pay the defendant for these two tickets? A. My recollection was $2.00 apiece, $4.00 for the two tickets.

Mr. Hogan: I offer the two tickets in evidence.

The Court: Received. (Marked People's Exhibit One in Evidence.) (Two tickets.)" (Record, p. 3, fols. 6, 7.)

"Q. Did you ask the defendant if he had taken out a bond in pursuance to the law? A. I did, and I also asked him if he was aware of the new law that required him to have a bond and he said he was, and I said, up to the present you have not taken out a bond, and he said, no.

Mr. Hogan: Will it be conceded by Mr. Marshall, that People's Exhibit One in Evidence, two Palace Theatre tickets, are tickets of admission to the Palace Theatre and entitled the holder to admission on the date stamped thereon, to the matinee of Thursday, October 26th, 1922.

Mr. Marshall: I will concede that.

Q. *Did you ask the defendant, if he was in the business of reselling theatre tickets?* A. *I did.*

Q. *What did he say in response to that question?* A. *He said, he was for the last ten years*" (Record, p. 4, fol. 8).

Counsel for plaintiff-in-error made the following concessions:

"Mr. Hogan: Will it be conceded that the defendant had not complied with Section 168 of the General Business Law.

Mr. Marshall: I will concede that Mr. Weller did not have a license and has not had a license and that he did not give a bond, and that he did not comply with the requirements of the statute, which is Chapter 590 of the Laws of 1922.

Mr. Hogan: With that concession, that is the People's case.

Mr. Marshall: I will also admit that he did not make an application because I advised him that the law was unconstitutional.

Mr. Hogan: People's case" (Record, p. 4, fols. 8, 9).

## The Questions Involved.

It will be observed that the statute contains two salient provisions:

**I.** It prohibits persons from engaging in the business of selling theatre tickets unless they obtain a license from the comptroller. "Such license shall be granted upon the payment by or on behalf of the applicant of a fee of one hundred dollars and shall be renewed upon the payment of a like fee annually" (§168).

**II.** It places a restriction upon the amount which licensed ticket sellers may charge the public for theatre tickets. It provides that they shall not resell any such ticket "in excess of fifty cents in advance of the price printed on the face of such ticket or other evidence of the right of entry" (§172).

It is contended by the plaintiff-in-error that the price restriction feature of the statute is inseparably connected and interwoven with the licensing

feature of it and that consequently, if the price restriction feature is invalid, the entire statute will have to fall.

We contend (1) that the price restriction provision is not so blended with the licensing provision that the validity of the latter would be necessarily dependent upon the validity of the former.

We also contend—although we maintain the question is not really involved in this case—(2) that the price restriction provision is a valid exercise of the police power.

## POINT I.

**The provision requiring ticket sellers to obtain a license is valid.**

It is elementary that courts will always presume that the legislature did not intend to exceed its constitutional powers.

> *Matter of McAneny* v. *Bd. of Estimate*, 232 N. Y. 377, 389;
> *Devoy* v. *Craig*, 231 N. Y. 186, 189.

> "A statute must be construed, if fairly possible, so as to avoid not only the conclusion that it is unconstitutional but also grave doubts upon that score."
>
> *United States* v. *Jin Fuey Moy*, 241 U. S. 394, 401;
> *Bratton* v. *Chandler*, 260 U. S. 110, 114;
> *Panama R. R. Co.* v. *Johnson*, 264 U. S. 375, 390.

It is also elementary that all property and all occupations are subject to the exercise of the police power. As to a statute requiring a person who kept an employment agency to take out a license, the Court in *People ex rel. Armstrong* v. *Warden* (183 N. Y. 223, 226), said:

> "All business and occupations are conducted subject to the exercise of the police power. Individual freedom must yield to regulations for the public good. It may be laid down as a general principle that legislation is valid which has for its object the promotion of the public health, safety, morals, convenience and general welfare or the prevention of fraud or immorality."

The following rule was stated in *People* v. *Beakes Dairy Co.* (222 N. Y. 416, 427):

> "Any trade, calling or occupation may be reasonably regulated if 'the general nature of the business is such that unless regulated many persons may be exposed to misfortunes against which the legislature can properly protect them.'"

In *Munn* v. *Illinois* (94 U. S. 113), the Court speaking of the "police powers"—which Chief Justice Taney had defined as being "nothing more or less than the powers of government inherent in every sovereignty"—"the power to govern men and things"—said [pp. 125, 126]:

> "Under these powers the government regulates the conduct of its citizens one towards another, and the manner in which each shall use his own property, when such regulation becomes necessary for the public good. In their exercise it has been customary in England from time immemorial, and in this coun-

try from its first colonization, to regulate ferries, common carriers, hackmen, bakers, millers, wharfingers, innkeepers, &c., and in so doing to fix a maximum of charge to be made for services rendered, accommodations furnished, and articles sold. To this day, statutes are to be found in many of the States upon some or all these subjects; and we think it has never yet been successfully contended that such legislation came within any of the constitutional prohibitions against interference with private property. * * * From this it is apparent that, down to the time of the adoption of the Fourteenth Amendment, it was not supposed that statutes regulating the use, or even the price of the use, of private property necessarily deprived an owner of his property without due process of law. Under some circumstances they may, but not under all. The amendment does not change the law in this particular; it simply prevents the States from doing that which will operate as such a deprivation. This brings us to inquire as to the principles upon which this power of regulation rests, in order that we may determine what is within and what without its operative effect. Looking, then, to the common law, from whence came the right which the Constitution protects, we find that when private property is 'affected with a public interest, it ceases to be *juris privati* only'. This was said by Lord Chief Justice Hale more than two hundred years ago, in his treatise *De Portibus Maris*, 1 Harg. Law Tracts, 78, and has been accepted without objection as an essential element in the law of property ever since. Property does become clothed with a public interest when used in a manner to make it of public consequence, and affect the community at large. When, therefore, one devotes his property to a use in which the public has an interest, he, in effect, grants to the public an interest in that use,

> and must submit to be controlled by the public for the common good, to the extent of the interest he has thus created. He may withdraw his grant by discontinuing the use; but, so long as he maintains the use, he must submit to the control."

As to the tests to be applied to determine when a business is "affected with a public interest," in *Ratcliff* v. *Stock-Yards Co.* (74 Kans. 1, at page 6; 86 Pac. 150), the Court said:

> "Many kinds of business carried on without special franchises or privileges are treated as public in character, and have therefore been subjected to legislative regulation and control. The nature and extent of the business, the fact that it closely touches a great many people and that it may afford opportunities for imposition and oppression, as in cases of monopoly, and the like, are circumstances affecting property with a public interest."

In *Wolff Co.* v. *Industrial Court* (262 U. S. 522), the Court divided the kinds of business "said to be clothed with a public interest" into three classes and, at page 538, said:

> "In nearly all the businesses included under the third head above, the thing which gave the public interest was the indispensable nature of the service and the exorbitant charges and arbitrary control to which the public might be subjected without regulation."

Also see article in the Yale Law Journal, December, 1923, pages 196-201, entitled "The Fate of the Kansas Industrial Court."

**a.** The business of conducting a theatre, though in one sense private, is not "strictly" private.

It is a business that is "affected with a public interest" (*Aaron* v. *Ward*, 203 N. Y. 351, 356; *People* v. *King*, 110 N. Y. 418, 427; *People ex rel. Cort Theater Co.* v. *Thompson*, 238 Ill. 87; L. R. A., 1918-D 382, 388). It is because the business is "affected with a public interest" that governmental regulation is justified (*Aaron* v. *Ward*, *supra*).

As said by the Court of Appeals in *People* v. *King* (*supra*) at page 427:

> "The business of conducting a theater or place of public amusement is also a private business in which any one may engage, in the absence of any statute or ordinance. But it has been the practice, which has passed unchallenged, for the legislature to confer upon municipalities the power to regulate by ordinance the licensing of theaters and shows, and to enforce restrictions relating to such places, in the public interest, and no one claims that such statutes are an invasion of the right of liberty or property guaranteed by the Constitution."

In *Aaron* v. *Ward* (*supra*) the Court said [pp. 355-356, 357]:

> "In several of the reported cases the keeping of a theater is spoken of as a strictly private undertaking, and it is said that the owner of a theater is under no obligation to give entertainments at all. The latter proposition is true, but the business of maintaining a theater can not be said to be 'strictly' private. In People *v.* King (110 N. Y. 418) the question was as to the constitutionality of the Civil Rights Act of this state which made it a misdemeanor to deny equal enjoyment of any accommodation, facilities and privileges of inns, common carriers, theaters or

> other places of public resort or amusement regardless of race, creed or color, and gave the party aggrieved the right to recover a penalty of from fifty to five hundred dollars for the offense. The statute was upheld on the ground that under the doctrine of *Munn* v. *Illinois* (94 U. S. 113) theaters and places of public amusement (the case before the court was that of a skating rink) *were affected with a public interest which justified legislative regulation and interference* (Italics ours) * * * That public amusements and resorts are subject to the exercise of this legislative control shows that they are not entirely private."

In *Opinion of Justices to the Senate* (247 Mass. 589, 595), it is said:

> "In the light of their history in this commonwealth, but without resting wholly upon that ground, we are of opinion that theaters and other places of public amusement are affected with a public interest and devoted to a public use. There are decisions in other jurisdictions to this effect. *People* v. *King*, 110 N. Y. 418, 428; *Donnell* v. *State*, 48 Miss. 661, 680, 681; *Aaron* v. *Ward*, 203 N. Y. 351, 356. See Civil Rights Cases, 109 U. S. 3, 41, 42.

The counsel for the plaintiff in error relies upon *Woolcott* v. *Shubert*, (217 N. Y. 212), to support his contention that the "business of conducting a theatre and consequently of selling or procuring tickets of admission is not affected by a public interest" (Brief of Plaintiff-in-Error, pp. 49, 53). In that case, at page 216, the Court says:

> "At the common law a theatre, *while affected by a public interest* which justified

> licensing under the police power or for the purpose of revenue, is in no sense public property or a public enterprise." (Italics ours.)

That the business of conducting a theatre is "affected with a public interest" is very evident when the purposes of the theatre are considered. Theatres are operated to furnish recreation and amusement to the public. They are the chief means of recreation which the people have after cessation from their daily labors. The theatres afford that relaxation of mind which is conducive to health, comfort and good morals.

There is also another important function of the theatre in that it promotes public education. As the population becomes more congested in great cities, as the hours of labor become shorter, the necessity of affording recreation, amusement and education to the inhabitants becomes more imperative. Therefore the theatre becomes more essential to the welfare of the public; it becomes more "affected with a public interest." See

> *People* v. *Weller,* 207 N. Y. App. Div. 337, 341, 342.
> *Opinion of Justices to Senate,* 247 Mass. 589, 594-595.

The trend of modern thought as to the functions of the theatre is shown by a recent speech delivered by Hon. James M. Beck, Solicitor General of the United States, at the jubilee of the Pennsylvania Society held in New York City on December 15, 1923. The subject of his speech was "Our Silver Jubilee: A Retrospect," and he is

reported to have made during his speech the following statement:

> "You may agree with me in this diagnosis, but you may ask, what is the remedy?
> Time would not permit me to discuss it even though I had the ability. One thing is clear—that nothing can stop the influence of a mechanical age in lessening the hours of labor, and if there is to be any salvation for human society, it must lie in the better utilization by man of his lengthening hours of leisure. That he may wisely use these, it is necessary that he should be given a truer sense of the values of human life, and this should be the mission of the great institutions which mold human thought, like the church, the school, the press, the theatre."

The New York Times, Sunday, December 16, 1923, Section 1, pages 1 and 18.

The President of the United States in his recent address to Congress on December 5, 1923, in discussing the fiscal condition of the country, said:

> "The amusement and educational value of moving pictures ought not to be taxed."

The New York Times, Friday, December 7, 1923, page 4, col. 2.

Historically considered theatres may be regarded as "affected with a public interest."

A. E. Haigh in his book, "The Attic Theatre," at page 4, says:

> "To provide for the amusement and instruction of the people was, according to the Greeks, one of the regular duties of a gov-

ernment; and they would have thought it unwise to abandon to private venturers an institution which possessed the educational value and wide popularity of the drama."

See also

*People* v. *Weller*, 207 N. Y. App. Div. 337, 342.

In the time of ancient Rome theatres were regulated by law.

Encyclopaedia Britannica, 11th Ed., Vol. 26, pp. 736, 737.

The operation of a theatre was a proper municipal purpose.

"Municipalities were encouraged to build theatres (Dig. 1, 10, 3)."

Encyclopaedia Britannica, 11th Ed., Vol. 26, p. 736.

That the business of operating a theatre is "affected with a public interest" is shown by the fact that the state may give the power to a city to establish and conduct a theatre the same as in ancient times. In Ruling Case Law (Vol. 19, p. 722) there is the following statement:

"The trend of authority, in more recent years, has been in the direction of permitting municipalities a wider range in undertaking to promote the public welfare or enjoyment. Thus, the appropriation of money for public concerts has been held to be proper. So, too, the erection of an auditorium has been regarded as properly falling within the purposes for which a municipal corporation may

> provide. Generally speaking anything calculated to promote the education, the recreation or the pleasure of the public is to be included within the legitimate domain of public purposes, and on this ground it has even been held that authority to erect and conduct an opera house may be conferred upon a municipal corporation."

See:

> *Egan* v. *City and County of San Francisco*, 165 Cal. 576; 133 Pac. Rep. 294, 295, 296;
> *Los Angeles County* v. *Dodge*, 197 Pac. Rep. 403, 406, 407 [Cal.];
> *Schieffelin* v. *Hylan*, 236 N. Y. 254, 265, 266.

It is true that in *State ex rel. City of Toledo* v. *Lynch* (88 O. St. 71; S. C. 102 Northeastern Reporter 670) the Court decided that the City of Toledo did not under its charter have the power to establish and maintain a moving picture show. The question there determined was whether the establishment and operation of a moving picture show is within the meaning of the expression "the powers of local self-government."

Counsel for plaintiff-in-error does not agree, it seems, with the notion of the ancient Greeks that the theatre is an institution of educational value.

At page 69 in his brief he states:

> "Nor, judging from the majority of plays which now degrade the stage and are offensive to a considerable part of the public, may it be said that they contribute to the public education."

Counsel seem rather to favor the notion of the Puritans and the Pilgrim Fathers who "would have been astounded" had it been suggested to them that the theatre was "affected with a public interest," as that phrase is used in the act now under consideration. That there are plays which "now degrade the stage" is a controlling reason why the theatre—a great institution for molding human thought—should be regarded as affected with a public interest and under the supervision of the State. See:

> *Opinion of Justices to Senate*, 247 Mass. 589, 593-594.

That there are degrading plays is an abuse of an educational institution, and the Penal Law of New York provides for the punishment of such abuse. See

> Penal Law, §§1140a and 1530, subdivision 2;
> *People* v. *Doris*, 14 N. Y. App. Div. 117, appeal dismissed 153 N. Y. 678.

Since the business of operating a theatre is "affected with a public interest" it is universally recognized that it is proper for the state to require a license. In *People ex rel. Duryea* v. *Wilber* (198 N. Y. 1, 9), the court said:

> "Licenses have been required for theatres and places of public amusement in this state for nearly a century. * * * The tendency of such places is to attract a crowd, and it is said that they require more or less of governmental supervision and regulation."

In *Mutual Film Corp.* v. *Ohio Indus'l Comm.* (236 U. S. 230), at page 244, this Court said:

> "As pointed out by the District Court, the police power is familiarly exercised in granting or withholding licenses for theatrical performances as a means of their regulation."

The kinds of business for which licenses or permits have been required are innumerable. Where the business is one which affords opportunities for fraud, deception, discrimination and the like, the power to license is unquestionable. See:

*Brazee* v. *Michigan*, 241 U. S. 340;
*People ex rel. Armstrong* v. *Warden*, 183 N. Y. 223;
*Lieberman* v. *Van De Carr*, 199 U. S. 552; aff'g. 175 N. Y. 440;
*Stern* v. *Met. Life Ins. Co.*, 169 App. Div. 217, aff'd. 217 N. Y. 626;
*Crowley* v. *Christensen*, 137 U. S. 86;
*Gundling* v. *Chicago*, 177 U. S. 183;
*Cargill Co.* v. *Minnesota*, 180 U. S. 452;
*Lehon* v. *Atlanta*, 242 U. S. 53.

And the state may delegate the authority to grant such licenses or permits to administrative boards or officers, and vest discretion in them to grant or withhold them.

*Lieberman* v. *Van De Carr*, 199 U. S. 552; aff'g. 175 N. Y. 440;
*Gundling* v. *Chicago*, 177 U. S. 183;
*Crowley* v. *Christensen*, 137 U. S. 86;
*Bradley* v. *Richmond*, 227 U. S. 477;
*Lehon* v. *Atlanta*, 242 U. S. 53;
*Stern* v. *Met. Life Ins. Co.*, 169 App. Div. 217, 220, affd. 217 N. Y. 626;

*People* v. *Kaye*, 212 N. Y. 407, 416;
*People ex rel. Schwab* v. *Grant*, 126 N. Y. 473;
*Douglas* v. *Noble*, 261 U. S. 165, 168.

Recently the courts have held constitutional, statutes that required real estate brokers and real estate salesmen to procure licenses from such boards and officers.

*Bratton* v. *Chandler*, 260 U. S. 110;
*Riley* v. *Chambers*, 181 Cal. 589; 185 Pac. Rep. 855.

**b.** The business of a theatre ticket broker is so intimately related to the business of conducting a theatre that likewise the legislature has power to impose as a condition to engage in such an occupation that a license should be obtained. This close relationship is clearly shown in the case at bar by the evidence introduced by the defendant.

David Marks, a theatre ticket broker and a witness for the defendant, testified on his direct examination as follows:

"Q. In a general way, how is that business carried on and has it been carried on? A. We have charge accounts with various people in the City of New York and outside of New York and we do a cash business, and a charge of fifty cents is still maintained in the large offices in the City of New York.

Q. And occasionally you charge more? A. Yes, sir.

Q. Why is that? A. We are compelled to buy merchandise months in advance, and if the show is a poor show the loss is ours.

Q. You look upon these tickets as merchandise? A. Yes, sir.

Q. Whom do you get these tickets from? A. Theatre managers.

Q. How do you get them from the theatrical managers? A. *We buy them in blocks, each office is allowed so many seats.*

Q. The theatrical managers put on a production, whatever the play may be? A. Yes, sir.

Q. Then they say to the ticket brokers, that they will allow them to have a certain number of tickets for that production? A. Yes, sir.

Q. When is that part of the arrangement made? A. Before the show is cast and before we know anything about who is in the show, we are sent for and told how many tickets we are to get and each office has to pay, is compelled to buy.

Q. Who sends for you? A. The managers of the various productions" (Record, pp. 5, 6, fol. 10).

"Q. You are telling us just how the brokers get their tickets from the various theatre owners. You say, that when an attraction is about to be put on the boards, before there has been a production of the play at all, you are sent for, the various brokers, by the theatre owners and a conversation takes place? A. Yes, sir.

Q. What is the nature of the conversation? A. We are going to produce—the manager of the theatre representing the owner of the theatre, we are going to produce a show four weeks from next Monday night and it is going to open at a certain theatre, and they say, how many seats do you want for that show for eight weeks in advance? We have asked for time to see how many we can use for that production at that particular theatre, and we are not given time in many cases and we must purchase the number of tickets, and we have got to buy them for eight weeks in advance, and we don't know the name of the

show or the cast, and we are compelled to buy them at four and five dollars a piece plus the war tax and compelled to pay for them and pay for them at that rate for eight weeks in advance, running into an investment of fifty or sixty thousand dollars.

Q. *In other words, you finance the theatrical performance?* A. *Yes, sir.*

Q. And you have to pay in advance? A. Yes, sir, and it takes hundreds of thousands of dollars.

Q. Suppose the play is not a success? A. They are left on our hands. We have a return privilege of twenty-five, sometimes fifteen and sometimes ten. If a person wants three tickets and we make a $1.50 total profit on tickets that may have cost four or five dollars apiece.

Q. That has been going on all these years? A. Yes, sir.

Q. And that is still the practice today? A. Yes, sir.

Q. Do they ever take these plays off the boards before the full period of time? A. I have not heard of two cases where they stopped the show.

Q. You have not heard of more than two or three cases, where notwithstanding the fact the the play is a failure they have stopped the performance? A. Yes, sir.

Q. And because you are bound to pay this amount, it is a dead loss if you cannot see (*sic*) the tickets? A. Yes, sir; a loss of thousands of dollars on a production.

Q. And that is your experience? A. Yes, sir.

Q. They allocate to the several ticket brokers of the city the number of tickets that they may have and the number that they are required to take if they want any tickets? A. Yes, sir, right'' (Record, pp. 78, fols. 14, 15).

As attending places of amusement constitutes one of the chief means of recreation of the inhabitants of the city and the business of ticket selling is closely connected with that of conducting places of public amusement, and as the business of conducting a theatre is a business affected with a public interest, it naturally follows that the business of ticket selling is one which properly comes within the power of the State to regulate and to require a license to carry on such business. In particular the State has this power, if abuses have developed in the business as it is ordinarily carried on.

The distribution of tickets is very largely in the hands of ticket brokers. It is easy to see that these ticket brokers have many opportunities for practising fraud upon and deceiving the public. The ticket broker might sell tickets to persons for seats already sold to other persons. He might discriminate against particular persons or classes of persons in selling and distributing the tickets. He might sell tickets for places of amusement that are closed or for shows that are not running. He might deceive the persons as to the location of the seats. And his business being generally conducted at a place distant from the theatre, the purchaser will very often have difficulty in obtaining redress.

To quote the words of the Supreme Court in *Brazee* v. *Michigan* (241 U. S. 340, 343)—relative to employment agencies:

> "The general nature of the business is such that unless regulated many persons may be exposed to misfortune against which the legislature can properly protect them."

It is conceded that evils flow from the present system of selling theatre tickets.

*People* v. *Thompson*, 238 Ill. 87; 119 Northeastern Rep. 41, 45, 46.

Abuse frequently results therefrom and patrons of theatres suffer imposition.

*Collister* v. *Hayman*, 183 N. Y. 250, 254.

In the case at bar the Court below said:

> "The existence of extortion due to present unregulated conditions in the business of reselling tickets of admission to places of public amusement is widely recognized; the abuse is due to acts of the ticket brokers alone or in conjunction with producers, and these acts are calculated to injure large numbers of the public in connection with a business which is at least to some degree affected with a public interest. The Legislature under the police power has in our opinion clearly the right under these circumstances to attempt to remedy the abuse. The proposed remedy encroaches upon the liberty of the individual only to the extent that the Legislature might properly regard as reasonably calculated to remedy the abuse, and the people have placed upon the Legislature the responsibility of determining whether the remedy is wise and will promote the public welfare" (*People* v. *Weller*, 237 N. Y. 316, 331).

See also

*People* v. *Weller*, 207 N. Y. App. Div. 337, 339.

*Opinion of Justices to Senate*, 247 Mass. 589, 596.

That there are abuses in this business of ticket selling is evidenced by the legislation that has been passed in the various states. See:

> *People* v. *Thompson*, 238 Ill. 87; 119 Northeastern Reporter 41, and cases cited.

During the year 1923 at least two states, Illinois and New Jersey, passed statutes as to the sale of tickets to places of amusement.

> Laws of Illinois, 1923, pages 322, 323;
> Laws of New Jersey, 1923, page 143, ch. 71.

During the following year, 1924, while a similar bill was pending in the Massachusetts Senate, the advice of the Justices of the Supreme Judicial Court of that State was sought on the constitutionality of the bill. In a carefully considered opinion, in which the opinion of the New York Court of Appeals in the case at bar was referred to, the Senate was advised that the bill, if enacted into the law, would be constitutional. See:

> *Opinion of Justices to Senate*, 247 Mass. 589.

Thereafter, an act was passed, containing the substantial features of the proposed bill. See:

> *Acts and Resolves of Massachusetts for 1924*, c. 497, p. 551.

It is submitted that this conception of different law-making bodies that the business of selling theatre tickets so far affects the public welfare

as to require legislative regulation, cannot be accidental and without cause. See:

> *German Alliance Insurance Co.* v. *Kansas*, 233 U. S. 389, 412.

Governor Miller in his approval of the bill (Chap. 590, Laws 1922) said that the bill was aimed at "an undoubted abuse" (Brief of Plaintiff-in-Error, page 10).

In *People* v. *Newman* (109 N. Y. Misc. Rep. 622, 660), it was admitted by the Court that there was "evil flowing from this business" and that it "should be corrected." But the Court seemed to think that the evil could only be remedied by the theatrical managers.

At page 660 the Court said:

> "The remedy, in my judgment, can come from the producing managers of the theatres."

The evidence set forth above of David Marks, a witness for the plaintiff-in-error shows how hopeless it is to expect any reform from "the producing managers of the theatres."

The following excerpts from the opinion of the New York Appellate Division in the case below show how little can be expected from this "remedy":

> "The method now pursued in the disposal or resale of tickets was described at the trial. It is interesting in that it shows a community of interest between the theatre managers and the brokers who sell to the public, or an underwriting of the attraction by the speculator for which the public must pay. The

hope or expectation that the abuses or evils in theatre ticket speculation may be remedied by the producing managers is dispelled by the testimony in this case. * * *

This testimony gives an idea of the theatre ticket business which is carried on by the brokers, and how intimately connected it is with that of the theatre and theatre owners and managers.

It is apparent from this record that the theatres and ticket brokers have an understanding or arrangement for the resale of tickets. The modern method of selling tickets indicates that there is a working agreement between the managers or owners and the speculator or ticket brokers."

*People* v. *Weller*, 207 N. Y. App. Div. 337, 347, 348.

See also:

*Opinion of Justices to Senate*, 247 Mass. 589, 596.

To concede that the only cure for the evil is some remedy initiated by the managers of theatres is to admit that the State is powerless to promote the general welfare of the people and to accomplish the purposes for which governments are founded. See:

*People ex rel. Durham R. Corp.* v. *La Fetra*, 230 N. Y. 429, 442, 443.

When evils result from the carrying on of a business one of the most appropriate ways to check these evils is to require the persons engaged in this business to take out licenses on the terms prescribed by law.

*State* v. *Conlon*, 65 Conn. 478; 33 Atl. Rep. 519, 521.

An inspection of the language of §167 of the statute under consideration gives rise to the reasonable inference that the legislature has investigated the subject of selling theatre tickets and has determined it is necessary to regulate the business "*for the purpose of safeguarding the public against fraud, extortion, exorbitant rates and similar abuses.*"

The determination of the legislature "is entitled at least to great respect" (*Bloch* v. *Hirsch*, 256 U. S. 135, 154).

The language of the United States Supreme Court, in *Middleton* v. *Texas Power & Light Co.* (249 U. S. 152, 157), was:

> "There is a strong presumption that a Legislature understands and correctly appreciates the needs of its own people, that its laws are directed to problems made manifest by experience, and that its discriminations are based upon adequate grounds."

See also:

*Ward & Gow* v. *Krinsky*, 259 U. S. 503, 521.

**c.** Nor is this statute objectionable upon the ground that it vests discretion in the comptroller to grant or withhold a license.

The authority to grant or withhold is based upon "the honest exercise of a reasonable discretion" (*Lieberman* v. *Van De Carr*, 199 U. S. 552, 559). The presumption is that such discre-

tion will be properly exercised—that the law will be properly administered (*People ex rel. Lieberman* v. *Van de Carr*, 175 N. Y. 440, aff'd 199 U. S. 552; *People* v. *Kaye*, 212 N. Y. 407, 416; *Stern* v. *Met. Life Ins. Co.*, 169 App. Div. 217, 220); and this holds good until, in a concrete case, the contrary is made to appear.

In *People of the State of New York ex rel. Lieberman* v. *Van de Carr, Warden* (199 U. S. 552, 562), Mr. Justice Day said:

> "These cases leave in no doubt the proposition that the conferring of discretionary power upon administrative boards to grant or withhold permission to carry on a trade or business which is the proper subject of regulation within the police power of the State is not violative of rights secured by the Fourteenth Amendment. There is no presumption that the power will be arbitrarily exercised, and when it is shown to be thus exercised against the individual under sanction of State authority, this court has not hesitated to interfere for his protection, when the case has come before it in such manner as to authorize the interference of a Federal Court."

See also:

*Douglas* v. *Noble*, 261 U. S. 165, 168.

The fact that a law may be mistakenly administered is no ground for holding the law itself unconstitutional.

*People ex rel. Nechamcus* v. *Warden*, 144 N. Y. 529, 539;

*Mont. Co.* v. *St. L. M. Co.*, 152 U. S. 160, 170;

*Arrowsmith* v. *Harmoning*, 118 U. S. 194;
*N. O. W. W. Co.* v. *L. S. R. Co.*, 125 U. S. 18;
*St. P. &c. Ry.* v. *Todd Co.*, 142 U. S. 282;
*Howard* v. *Kentucky*, 200 U. S. 164.

It is not what the person administering the law may arbitrarily conceive he may do and does that determines the validity of the law; it is what may lawfully be done under the law as properly and legally construed and applied that governs.

*People ex rel. Berger* v. *Warden*, 176 N. Y. App. Div. 602, 606.

It will be time enough to pass upon the question when some person who was arbitrarily refused a license comes forward with a prayer for relief.

It will be observed that Governor Miller in approving the act (Chapter 590, Laws 1922), stated:

> "*The licensing feature by itself is undoubtedly valid*" (Italics ours).

## POINT II.

**The price restriction feature of the statute is valid.**

The business of conducting theatres, to which business that of the selling of theatre tickets has become a fixed adjunct, is not strictly private. It is one "affected with a public interest" (*People* v. *King, supra; Aaron* v. *Ward, supra;* see also *People ex rel. Cort Theatre Co.* v. *Thompson*, 238

Ill. 87; 119 Northeastern Reporter, 41, 45; *Opinion of Justices to Senate,* 247 Mass. 589, 594-595).

The business of ticket selling being so interwoven with the business of operating a theatre that the latter business cannot be regulated without exercising the police power over the former business, it follows that the business of ticket selling is likewise "affected with a public interest." Consequently the State has the power to regulate the business of ticket selling (*Opinion of Justices to Senate,* 247 Mass. 589).

It may be said of this business as was said of the insurance business that "it having become 'clothed with a public interest' and therefore" it was "subject 'to be controlled by the public for the common good.' "

> *German Alliance Ins. Co.* v. *Kansas,* 233 U. S. 389, 415.

**a.** *This power of regulation embraces the fixing of reasonable charges to the public for the services rendered.*

In *Bloch* v. *Hirsch* (256 U. S. 135, 157), the language of the Court was:

> "But if the public interest be established the regulation of rates is one of the first forms in which it is asserted, and the validity of such regulations has been settled since *Munn* v. *Illinois,* 94 U. S. 113."

The business of ticket selling stands substantially on the same footing as the grain elevator and like cases (*Munn* v. *Illinois,* 94 U. S. 113). It comes directly within the principle of the *Munn*

case (*supra*)—the principle of which has not only been adhered to but expanded and advanced to meet conditions as they arise. There, it was held that the State could fix a maximum charge for storing and elevating grain. The basic ground of the decision was that the business was one affected with a public interest, and that, hence, a reasonable charge for the service rendered could be prescribed.

In speaking of the police powers, the Court said [p. 125]:

> "Under these powers the government regulates the conduct of its citizens one towards another, and the manner in which each shall use his own property, when such regulation becomes necessary for the public good. In their exercise it has been customary in England from time immemorial, and in this country from its first colonization, to regulate ferries, common carriers, hackmen, bakers, millers, wharfingers, innkeepers, &c., and in so doing to fix a maximum of charge to be made for services rendered, accommodations furnished, and articles sold. To this day, statutes are to be found in many of the States upon some or all these subjects; and we think it has never yet been successfully contended that such legislation came within any of the constitutional prohibitions against interference with private property."

The decision in the *King* case (110 N. Y. 418) was based largely upon the decision in the *Munn* case; and it establishes the proposition that places of public amusement fall in the same category as those businesses referred to in the opinion in the *Munn* case.

It is submitted that the cases usually cited (*People* v. *Steele*, 231 Ill. 340; *Ex parte Quarg*, 149 Cal. 79) as to the sale of theatre tickets do not contain the price restriction feature such as the case at bar (*Opinion of Justices to Senate*, 247 Mass. 589, 597).

It will be observed in these cases the legislation condemned, either (*a*) prohibited the business altogether or (*b*) prohibited the exacting of any additional charge. But that is an altogether different proposition from prescribing a reasonable charge for the service (*vid. People ex rel. Cort Theatre Co.* v. *Thompson*, 238 Ill. 87; 119 Northeastern 41, 43-45; *People* v. *Weller*, 207 N. Y. App. Div. 337, 353; *Opinion of Justices to Senate*, 247 Mass. 589).

That the Legislature may fix a reasonable maximum charge for the service where the matter is one in which the public has an interest has been settled by the decision in the *Munn* case. The *Munn* case has been frequently followed, approved and extended.

> *Budd* v. *New York*, 143 U. S. 517.
> *Brass* v. *Stoeser*, 153 U. S. 391.
> *German Alliance Ins. Co.* v. *Kansas*, 233 U. S. 389.

**b.** ***Regulation is warranted because exorbitant rates have been charged and there is a virtual monopoly.***

One of the chief evils of the business of ticket selling is the charge of *exorbitant rates* on the part of ticket sellers. This evil has been recognized for many years; and in several states at-

tempts have been made by the passage of statutes and ordinances to correct this abuse. See:

*People* v. *Thompson*, 238 Ill. 87; 119 Northeastern Reporter 41.

There even have been proprietors of theatres, it seems, who have tried to control the matter by contract and to prevent their patrons being left "to the mercy of speculators." See:

*Collister* v. *Hayman*, 183 N. Y. 250, 254.

In *People* v. *Thompson*, *supra*, at page 45, the Court stated:

> "It is true that individuals are not forced to buy tickets from scalpers, and are acting upon their own volition, but they are making their choice between paying the higher price and not witnessing the performance to which the public are invited."

In *Collister* v. *Hayman* (183 N. Y. 250, 254), decided in 1905, the Court states the following as to the "ticket speculator":

> "A ticket speculator is one who sells at an advance over the price charged by the management. Speculation of this kind frequently leads to abuse, especially when the theatre is full and but few tickets are left, so that extortionate prices may be exacted. A regulation of the proprietor, which tends to protect his patrons from extortionate prices is reasonable and he has the right to make it part of the contract and a condition of the sale."

It is evident that one of the abuses that led to the adoption of the statute (Chap. 590, Laws

1922, Sec. 167), was that the Legislature had found that "exorbitant rates" had been charged. The statute was passed, it seems, "for the purpose of safeguarding the public against fraud, extortion, exorbitant rates and similar abuses."

According to the testimony introduced by the defendant it seems the choice seats can only be obtained through the ticket sellers or brokers.

David Marks, a witness called on behalf of the defendant, in his direct examination testified as follows:

> "Q. If these people did not get these tickets from you in this way, how would they get them, they would have to go to the box office? A. No, sir. *The best they could get for any show is the fifteenth or sixteenth row.*
>
> Q. The best seats have been sold? A. The choice seats.
>
> Q. If anyone desires to go to the theatre for them at night, they would be far back in the house? A. Yes, sir" (Record, p. 10, fol. 19).

It also appears from the testimony of this witness given on cross-examination that there is a monopoly as to the sale of these choice seats.

The witness testified as follows on cross-examination:

> "Q. How many ticket speculators are there? A. Ticket brokers.
>
> Q. Yes, how many? A. Tyson and Company have eighteen branches, would you call it one office, or call each branch an office?
>
> Q. Call each branch a separate office. A. About thirty offices.
>
> Q. There are thirty offices where you can buy tickets from ticket brokers? A. Yes, sir.

> Q. And they are controlled by how many people? A. Probably a dozen or fifteen" (Record, p. 14, fol. 25).

From this testimony of a witness of the defendant—a "theatre ticket broker" (fol. 27)—it appears that the choice seats in the theatre can not be obtained at all from the box office of the theatre.

> "The best they could get for any show is the fifteenth or sixteenth row" (Record, p. 10, fol. 19).

Therefore if a person desires to obtain a choice seat he must obtain it from one of the offices of the ticket sellers and these offices are controlled by a few men.

> "Q. And they are controlled by how many people? A. Probably a dozen or fifteen" (Record, p. 14, fol. 25).

In *Ex parte Quarg* (149 Cal. 79)—quoted by counsel for appellant—it was said by the Court:

> "The sale of a theater ticket at an advance upon the original purchase price, or the business of reselling such tickets at a profit, is no more immoral, or injurious to public welfare or convenience, than is the sale of an ordinary article of merchandise at a profit. It does not injure the proprietor of the theater; he must necessarily have parted with the ticket at his own price and upon his own terms before such resale can be made. *It does not injure the second buyer; he must have had the same opportunity as the first buyer to purchase a similar ticket, and no greater right thereto, and having neglected that opportunity, or being unwilling to undergo the necessary inconvenience and willing*

> *to pay a higher price rather than forego the privilege which the other by his greater diligence and effort has obtained, the transaction is just so far as he is concerned.*" (Italics ours.)

It will be observed, according to the testimony of the witness for the defendant, David Marks, in the case at bar as to the choice seats the "second buyer" would not "have had the same opportunity as the first buyer to purchase a similar ticket." He could not have obtained such a ticket even if he had exercised the greatest "diligence and effort."

The best the "second buyer" could have obtained "for any show" would have been "the fifteenth or sixteenth row". Certainly it cannot be truly said "the transaction is just so far as he is concerned".

These men having this control can fix whatever price they desire for these seats. Thus an instrument designed to afford amusement, recreation and education to the people—poor as well as rich —is so controlled that only the rich can afford to purchase the best seats. The rich alone can pay the extortionate rates exacted.

Again the same situation is present that existed in the time of ancient Athens.

A. E. Haigh in his work, "The Attic Theatre", at page 330, states:

> "Until the close of the fifth century every man had to pay for his place, although the charge was a small one. But the poorer classes began to complain that the expense was too great for them, and that the rich

citizens bought up all the seats. Accordingly, a measure was framed directing that every citizen who cared to apply should have the price of the entrance paid to him by the state. The sum given in this way was called 'theoric money'. It used formerly to be supposed, on the strength of statements in Plutarch and Ulpian that this theoric system was introduced by Pericles. But the recently discovered Constitution of Athens has now shown that it was of much later date."

See also:

The Theatre of the Greeks by J. W. Donaldson, pages 309, 310.

American Cyclopaedia (Vol. 15, pp. 685, 686).

In Rome theatres were regulated by the State.

"The seats were allocated by the state and the care of the building committed to certain magistrates (Novel cxlix. 2)."

Encyclopaedia Britannica, Vol. XXVI, 11th Ed., page 736.

It is well settled that the existence of a virtual monopoly gives the legislature power to regulate rates.

*People* v. *Budd*, 117 N. Y. 1, 26, 27; affd. 143 U. S. 517.

*People ex rel. Durham R. Corp.* v. *La Fetra*, 230 N. Y. 429, 445.

The conditions in the case at bar are similar to those which led this Court to hold in *German Insurance Co.* v. *Kansas* (233 U. S. 389), that the business of insurance is so far affected with a

public interest as to justify legislative regulation of its rates. At pages 416 and 417 the language of this Court is:

> "We may venture to observe that the price of insurance is not fixed over the counters of companies by what Adam Smith calls the higgling of the market, but formed in the councils of the underwriters, promulgated in schedules of practically controlling constancy which the applicant for insurance is powerless to oppose and which, therefore, has led to the assertion that the business of insurance is of monopolistic character and that 'it is illusory to speak of a liberty of contract.' "

c. *The power to regulate rates does not have its foundation necessarily in any grant or privilege conferred by the State.*

It will be observed that, although the power to regulate rates is sometimes placed upon the ground that a special franchise or privilege has been granted, yet the power may exist though no such franchise or privilege has been granted. See:

> *People* v. *Budd*, 117 N. Y. 1, 26, 27; affd. 143 U. S. 517;
> *German Alliance Ins. Co.* v. *Kansas*, 233 U. S. 389, 411.

This principle has been very clearly stated in *Ratcliff* v. *Stock-Yards Co.*, 74 Kansas 1; 86 Pac. 150; 6 L. R. A. (N. S.) 834; 118 Am. St. Rep. 298; 10 Ann. Cas. 1016.

In an unanimous opinion the Court said at page 6:

"Many kinds of business carried on without special franchises or privileges are treated as public in character, and have therefore been subjected to legislative regulation and control. The nature and extent of the business, the fact that it closely touches a great many people and that it may afford opportunities for imposition and oppression, as in cases of monopoly and the like, are circumstances affecting property with a public interest. Police regulations of the business of dealing in patent rights have been maintained on the theory that it affords great opportunity for imposition and fraud. (*Mason* v. *McLeod*, 57 Kan., 105; 45 Pac., 76; 41 L. R. A., 548; 57 Am. St. Rep., 327; *Allen* v. *Riley*, 71 Kan., 378; 80 Pac., 952.)

"Public necessity and the public welfare are the broad general grounds upon which the right of legislative control is based, rather than that a special privilege has been conferred in consideration of which public control is conceded or required. In Munn *v.* Illinois, 94 U. S., 113, 24 L. Ed., 77, Chief Justice Waite, referring to the right to regulate business under the police power said: 'The Government regulates the conduct of its citizens one toward another, and the manner in which each shall use his own property, when such regulation becomes necessary for the public good' (p. 125). Upon these considerations the business of banking has been subjected to control, and the right to regulate the interest which may be charged for the use of money is now unquestioned. The police power is exercised in controlling the business of insurance, the operation of mills, hotels, theatres, wharves, markets, warehouses for the storage of grain and tobacco, common carriers, the collection and distribution of news, and the business of supplying and distributing water and gas. Some of these rest upon

considerations of health, or the safety or the convenience of the people, but all fall within the general grounds of public necessity and public welfare."

In pursuance of this principle the State would not be precluded from regulating the prices charged by ticket sellers although they received no special franchise or grant from the State.

**d.** *A business may become affected with a public interest owing to new conditions.*

Assuming that the business of ticket selling in its origin may not have been "affected with a public interest," yet such abuses have grown up in connection with the business—a business concerned with the amusement, recreation and education of the people—and so many have been subjected to extortionate charges that the business has become a proper subject for regulation under the police power.

In *German Alliance Ins. Co.* v. *Kansas* (233 U. S. 389, 411), the language of the Court was:

> "The cases need no explanatory or fortifying comment. They demonstrate that a business by circumstances and its nature, may rise from private to be of public concern and be subject, in consequence, to governmental regulation. And they demonstrate, to apply the language of Judge Andrews in *People* v. *Budd* (117 N. Y. 1, 27), that the attempts made to place the right of public regulation in the cases in which it has been exerted, and of which we have given examples, upon the ground of special privilege conferred by the public on those affected cannot be supported. 'The underlying principle is that business of

> certain kinds holds such a peculiar relation to the public interests that there is superinduced upon it the right of public regulation.'"

Again, when evils are admitted, great discretion should be allowed the legislature in devising remedies. If it has been demonstrated by experience that a remedy is not sufficient to check the evil, then certainly the legislature can under the police power adopt a new and more drastic remedy. It cannot be in such a case that the legislature is powerless. This power to adopt new remedies when old remedies fail is illustrated by the legislation as to lotteries, carrying concealed weapons and regulating the sale of intoxicating liquors.

A statute that made it a crime for a person to have in his possession lottery tickets without regard to the person's knowledge of what the articles were, was within the police power and did not deprive the accused of liberty without due process of law.

> *Ford* v. *State*, 85 Md. 465; 37 Atlantic Reporter, 172.

In the *Ford* case (*supra*) the Court, at page 173, said:

> "An examination of our statutes will show numerous efforts on the part of our legislatures to prevent the lottery business from being carried on in this state."

Therefore it would seem that the above drastic statute was upheld on the ground that other statutes had failed to prevent "the lottery business."

In *Noble State Bank* v. *Haskell* (219 U. S. 104, 110) a statute of Oklahoma compelling a state bank to contribute to a guarantee fund to protect deposits was held constitutional although there was "no denying that by this law a portion of its property might be taken without return to pay debts of a failing rival in business."

The Court seemed to hold that this remedy was appropriate to prevent the evils that the Oklahoma legislature anticipated from "free banking."

Many attempts have been heretofore made to regulate the theatre ticket selling business in this city.

It seems that proprietors of theatres even have attempted to protect their patrons by contract from paying extortionate prices for tickets.

*Collister* v. *Hayman*, 183 N. Y. 250.

An ordinance was passed excluding ticket sellers from carrying on their business "on or in any street in the city."

The Code of Ordinances of the City of New York, Chapter 3, Art 1, §12.

See also:

Penal Law, §1534 (Added by L. 1921, Ch. 12).

Yet, as the evils associated with the business continued—and especially the charging of extortionate rates—the Legislature was under a duty to pass the present statute and fix a rate. Its

inaction would have been a confession that it was "powerless to secure to its citizens the blessings of freedom and to promote the general welfare."

*People ex rel. Durham R. Corp.* v. *La Fetra*, 230 N. Y. 429, 443.

**e.** *The Legislature has determined that "the price of or charge for admission to theatres" "is a matter affected with a public interest."*

If there was any doubt about the business of selling theatre tickets being affected with a public interest that doubt was removed by the Legislature itself when it provided as follows in the statute:

> "§167. MATTERS OF PUBLIC INTEREST. It is hereby determined and declared that the price of or charge for admission to theatres, places of amusement or entertainment, or other places where public exhibitions, games, contests or performances are held is a matter affected with a public interest and subject to the supervision of the state for the purpose of safeguarding the public against fraud, extortion, exorbitant rates and similar abuses" (Laws 1922, ch. 590).

Evidently the legislature inquired into the facts and determined after investigation that the price charged for theatre tickets was "a matter affected with a public interest." "The legislature being familiar with local conditions is, primarily, the judge of the necessity of such enactments" (*McLean* v. *Arkansas*, 211 U. S. 539, 547).

It is incumbent upon the courts to give great weight to the legislative determination.

The rule is stated in *Patsone* v. *Pennsylvania* (232 U. S. 138, 144) as follows:

> "Obviously the question so stated is one of local experience on which this court ought to be very slow to declare that the state legislature was wrong in the facts."

In *Jones* v. *City of Portland* (245 U. S. 217), the question arose as to whether the establishment of a municipal wood yard was for a public purpose. At page 221 the Court said:

> "While the ultimate authority to determine the validity of legislation under the Fourteenth Amendment is vested in this court, local conditions are of such varying character that what is or is not a public use in a particular State is manifestly a matter respecting which local authority, legislative and judicial, has peculiar facilities for securing accurate information."

In *Bloch* v. *Hirsch*, (256 U. S. 135, 154) the Court said:

> "No doubt it is true that a legislative declaration of facts that are material only as the ground for enacting a rule of law, for instance, that a certain use is a public one, may not be held conclusive by the Court. *Shoemaker* v. *United States*, 147 U. S. 282, 298. *Hairston* v. *Danville & Western Ry. Co.*, 208 U. S. 598, 606. *Prentiss* v. *Atlantic Coast Line Co.*, 211 U. S. 210, 227. *Producers Transportation Co.* v. *Railroad Commission*, 251 U. S. 228, 230. But a declaration by a legislature concerning public conditions that by necessity and duty it must know, is entitled at least to great respect."

In *Los Angeles County* v. *Dodge* (51 Cal. App. 492; 197 Pac. Rep. 403, 406), the Court stated the following doctrine:

> "When the legislature or a board of supervisors or city council engaged in the exercise of legislative functions, proceeds upon the assumption that a matter concerning which it acts is one affecting the public interest or designed to promote the general welfare, the assumption is conclusive upon the courts, unless it is plainly apparent to them that the view entertained by the legislative body is without just foundation."

In upholding the so-called "housing laws" (*People ex rel. Durham R. Corp.* v. *La Fetra*, 230 N. Y. 429, 440), the language of the Court was:

> "Whether or not a public emergency existed was a question of fact, debated and debatable, which addressed itself primarily to the Legislature. That it existed; promised not to be presently self-curative, and called for action, appeared from public documents and from common knowledge and observation. If the law-making power on such evidence has determined the existence of the emergency and has, in the main, dealt with it in a manner permitted by the constitutional limitations upon legislative power, so far as the same affect the class of landlords now challenging the statutes, the legislation should be upheld."

In the recent case of *Schieffelin* v. *Hylan*, (236 N. Y. 254, 264, 265), this Court said:

> "At the threshold of such an investigation we encounter and, of course, subscribe obedience to the well-settled principle that when the legislative judgment has declared a given

act to be impressed with a purpose and character which bring it within a constitutional provision, courts are loath to interpose their judgment and to nullify the legislative act by declaring it unconstitutional. (*Loan Assn.* v. *Topeka*, 20 Wall. 655, 665; *Green* v. *Frazier*, 253 U. S. 233; *Weismer* v. *Vill. of Douglas*, 64 N. Y. 91)."

In *Armour & Co.* v. *North Dakota*, (240 U. S. 510, 513), the United States Supreme Court considered the statute requiring lard when not sold in bulk to be put in pails or other containers holding a specified number of pounds net weight and labeled as specified. In holding that such act was a constitutional exercise of police power, the Court said:

> "We said but a few days ago that if a belief of evils is not arbitrary we cannot measure their extent against the estimate of the legislature, and there is no impeachment of such estimate in differences of opinion, however strongly sustained. And by evils, it was said, there was not necessarily meant some definite injury but obstacles to a greater public welfare. Nor do the Courts have to be sure of the precise reasons for the legislation or certainly know them or be convinced of the wisdom or adequacy of the laws. *Rast* v. *Van Deman & Lewis*, *ante*, page 342; *Tanner* v. *Little*, *ante*, page 369."

In a recent case in this Court (*Radice* v. *People of the State of New York*, 264 U. S. 292) the constitutionality of the New York statute prohibiting the employment of women in restaurants between certain hours was upheld. At page 294, the language of the Court was:

> "Where the constitutional validity of a statute depends upon the existence of facts, courts must be cautious about reaching a conclusion respecting them contrary to that reached by the Legislature; and if the question of what the facts establish be a fairly debatable one, it is not permissible for the judge to set up his opinion in respect of it against the opinion of the lawmaker. The state Legislature here determined that night employment of the character specified was sufficiently detrimental to the health and welfare of women engaging in it to justify its suppression; and, since we are unable to say that the finding is clearly unfounded, we are precluded from reviewing the legislative determination."

But it is argued by counsel for plaintiff-in-error that certain of these cases "proceed upon an entirely different principle, namely, that an emergency existed which made it necessary for the state to interfere temporarily, and not permanently in the interest of public health" (Brief of Plaintiff-in-Error, page 45).

But in one of these cases (*People ex rel. Durham R. Corp.* v. *La Fetra*, 230 N. Y. 429), the Court stated that such regulatory power was not confined to "an emergency". At page 445, the Court said:

> "Even in the absence of an emergency, the state may pass wholesome and proper laws to regulate the use of private property. (*Lincoln Trust C.* v. *Williams Bldg. Corp.*, 229 N. Y. 313; *St. Louis Poster Advertising Co.* v. *City of St. Louis*, 249 U. S. 269). Laws restricting the use of property do not deal directly with the question whether a private business may be limited in its return to a

reasonable rate fixed by a force external to the law of supply and demand. Aside from the war power, the regulation of prices, except for public utilities, is unusual, although usury statutes which forbid the taking of exorbitant interest on the loan of money are common. The power of regulation exists, however, and is not limited to public uses or to property where the right to demand and receive service exists or to monopolies or to emergencies. It may embrace all cases of public interest, and the question is whether the subject has become important enough for the public to justify public action. (*Munn* v. *Illinois*, 94 U. S. 113; *Budd* v. *New York*, 143 U. S. 517; *Brass* v. *Stoeser*, 153 U. S. 391; *German Alliance Inc. Co.* v. *Kansas*, 233 U. S. 389; *Oklahoma Operating Co.* v. *Love*, 252 U. S. 331; *Holter Hardware Co.* v. *Boyle*, 263 Fed. Rep. 134; *American Coal Min. Co.* v. *Special C. & F. Comm., supra* [268 Fed. Rep. 563, 565]).

The field of regulation constantly widens into new regions. The question in a broad and definite sense is one of degree. As no similar legislation has been construed by the courts, precedent is of little value and may prove misleading. Formulas and phrases in earlier decisions are not controlling. (*Hudson County Water Co.* v. *McCarter*, 209 U. S. 349, 355.)"

In enacting the present statute the Legislature was dealing with the abuses of a system of long standing. A system that directly affected the welfare of the people as to their amusement, recreation and education. If the Legislature can act in an emergency, why not act when there is a chronic case?

Again it is submitted that this Court in determining whether local conditions justify state legislation not only give great weight to the estimate of the state Legislature as to the existence of evils, but also gives a cumulative effect to the recognition of the courts of the same state that those evils exist.

In *Green* v. *Frazier* (253 U. S. 233), at page 422, this Court said:

> "Under the peculiar conditions existing in North Dakota which are emphasized in the opinion of its highest court, if the State sees fit to enter upon such enterprises as are here involved, with the sanction of its constitution, its legislature and its people, we are not prepared to say that it is within the authority of this Court, in enforcing the observance of the Fourteenth Amendment, to set aside such action by judicial decision."

See, also, *Jones* v. *City of Portland*, 245 U. S. 217.

In the case at bar, not only has the Legislature determined "that the price of or charge for admission to theatres" "is a matter affected with a public interest and subject to the supervision of the state for the purpose of safeguarding the public against fraud, extortion, exorbitant rates and similar abuses", but the Court of Appeals of New York has stated:

> "The existence of extortion due to present unregulated conditions in the business of reselling tickets of admission to places of public amusement is widely recognized; the abuse is due to acts of the ticket brokers alone or in conjunction with producers, and these acts are

> calculated to injure large numbers of the public in connection with a business which is *at least to some degree affected with a public interest* (Italics ours). The Legislature under the police power has in our opinion clearly the right under these circumstances to attempt to remedy the abuse." *People* v. *Weller,* 237 N. Y. 316, 331.

See also:

> *Opinion of Justices to Senate,* 247 Mass. 589.

The plaintiff-in-error contends that one conducting a theatre, to say nothing about a ticket seller, is conducting a private business and cites *Collister* v. *Hayman,* 183 N. Y. 250, to support his contention.

It is true in that case, at page 254, the Court stated:

> "The defendants were conducting a private business which, even if clothed with a public interest, was without a franchise to accommodate the public, and they had the right to control it the same as the proprietors of any other business, subject to such obligations as were placed upon them by the statute hereinafter mentioned."

It will be noticed that the Court does not deny that the business may be "clothed with a public interest."

To understand the opinion in *Collister* v. *Hayman, supra,* it is necessary to bear in mind the question involved. The proprietors of the Knickerbocker Theatre in the City of New York were trying to accomplish the very purpose which the

present statute is designed to effect. They were attempting by contract to protect their "patrons from extortionate prices"; they did not want to leave their "patrons to the mercy of speculators."

The Court at page 254 stated:

> "The main question presented for decision is whether the defendants had the right to make a contract with purchasers upon the condition printed in the ticket. There is no restraint by statute against such a condition and it is not opposed to public policy. There is no tendency toward monopoly, for any one can buy and sell theatre tickets, provided the sales are not made on the sidewalk where the tickets themselves provide they cannot be sold. The law does not prevent the proprietor of a theatre from making reasonable regulations for the conduct of his business and imposing such reasonable conditions upon the purchasers of tickets as in his judgment will best serve the interests of that business. A ticket speculator is one who sells at an advance over the price charged by the management. Speculation of this kind frequently leads to abuse, especially when the theatre is full and but few tickets are left, so that extortionate prices may be exacted. A regulation of the proprietor, which tends to protect his patrons from extortionate prices is reasonable and he has the right to make it a part of the contract and a condition of the sale. Unless he can control the matter by contract and by conditions appearing upon the face of the ticket which is evidence of the contract, he may not be able to control it at all, but must leave his patrons to the mercy of speculators, such as the plaintiff, who, as he alleges, was accustomed to make at least $4,000 a year from his business. That amount, of course, came out of patrons of the theatre and if other ticket speculators

> carrying on the same business at various theatres in the City of New York are equally successful, the additional expense to theatre-goers must be very large."

Because the Court held that a contract made by proprietors of a theatre to protect their patrons from imposition was valid, it is evident that the Court never intended to hold that the legislature could not give the same protection through the medium of a statute. That no such inference can properly be drawn from the opinion in *Collister* v. *Hayman, supra,* is very clearly pointed out in *People* v. *Thompson,* 238 Ill. 87; 119 Northeastern Reporter 41. At pages 44 and 45 the Court, in discussing *Collister* v. *Hayman, supra,* says:

> "Much is said by counsel for appellee about the quotation in the Steele Case from Collister *v.* Hayman * * * and other statements of the same character about the nature of the business of running a theatre. The meaning and effect of the quotation and its utter and absolute inapplicability to this case will be apparent when the facts are stated. The defendants were managers of the Knickerbocker Theater, and the plaintiff Collister brought the action to restrain them from interfering with his business of selling on the sidewalk and outside of the prohibited limits tickets of admission to the theater, which was his business and from which he derived an income of $4,000 a year. On the ticket there was printed 'Tickets purchased on the sidewalk will positively be refused at the door.' The court said the business was a private one clothed with a public interest, and the owner had a right to regulate the terms of admission in any reasonable way, and had a right to prohibit ticket scalping by

> the notice on the ticket that if bought from a ticket scalper it would be refused at the door. Surely neither the Court of Appeals nor this court intended an affront to ordinary intelligence by holding that because the owners of the Knickerbocker Theater could prohibit ticket scalping the city of New York or a municipality of this state could not. The quotation and similar statements in the Steele Case were evidently for the purpose of making clear that the business was a private one."

Counsel for plaintiff-in-error contends that the legislature has no more right to regulate the price at which tickets can be sold than it would have a right to regulate the prices of products of the soil and the industry of artisans.

It is submitted that, if there was a monopoly in these products created by middlemen who made exorbitant profits, there is no doubt that the legislature would have the power to protect the people by curbing the greed of the profiteers as it has attempted to do in passing the present statute.

Counsel for plaintiff-in-error asks whether it would be within the purview of the legislative power to fix the prices which jewellers could charge, such prices being "based upon the charges of the diamond cutters at Amsterdam and London, or of the miner at Kimberly." Again he asks as to the validity of a regulation whereby vendors of rugs were limited "to making sales at a fixed percentage over their cost at Bagdad or in Bokhara, or that a licensed dealer in oil paintings was prohibited from disposing of them at a price exceeding to the extent of $100 that paid to the artist * * *." (Brief of the Plaintiff-in-Error, p. 22.)

These illustrations in respect to jewellers, dealers in rugs and oil paintings are in regard to luxuries and have no application to the present statute which deals with a necessity; which aims to secure amusement, recreation and education for the poor as well as the rich.

However, it is submitted that if dealers in rugs or precious stones carried on their business in such a way as to impose upon and deceive their customers, the legislature would have a right to regulate the business. (See Penal Law, §§422-431.)

In a recent case in Maryland (decided Jan. 11, 1923) an ordinance of Baltimore City prohibiting auction sales of jewelry, except in certain cases, was held constitutional within the Constitution of the United States 14th Amendment §1.

> *Mogul* v. *Gaither*, 142 Md. 380; 121 Atlantic Reporter 32.

But counsel for plaintiff-in-error answers (at p. 22):

> "The purchase of luxuries has been instanced because of the similarity between them and tickets of admission to the theatre or the opera."

It is submitted that counsel for defendant in claiming the similarity between luxuries and "tickets of admission to the theatre or the opera" concedes the contention of the prosecution that by "extortion" and "exorbitant rates" the theatre ticket brokers have made a *luxury* of that which in its nature is a *necessity*. The language of the Appellate Division is appropriate:

> "As the population becomes more congested in great cities, as the hours of labor become shorter, the necessity of affording recreation, amusement and education to the inhabitants becomes more imperative."
>
> *People* v. *Weller*, 207 N. Y. App. Div. 337, 341, 342.

The lessening of the hours of labor owing to the influence of this mechanical age make the theatre a necessity.

In the language of the Court in *State* v. *Harper* (196 Northwestern Reporter 451, 455 [Wis.]), "the luxuries of one decade become the necessities of another."

Thus becoming necessities, the Legislature had an undoubted right to intervene.

As was said by the Court below:

> "Yet the power of the Legislature in a proper case to 'promote the public welfare' by regulating or restricting acts which interfere with free negotiation between the consumers and producers of a commodity in common use and impede the operation of the laws of supply and demand should not be doubted (see opinion of Chief Justice White in Standard Oil Co. *v.* United States, 221 U. S., at pp. 50 to 58), and we see no distinction in principle between commodities and privileges or licenses such as tickets of admission, if there exists a general public demand for them and they are in common use."
>
> *People* v. *Weller*, 237 N. Y. 316, 328, 329.

Assuming the business affected has no connection with the manufacture or sale of luxuries; conceding that it is an ordinary manufacturing

or trading business or the business of the professional man. Yet the cases recognize that there is a great difference between such businesses as to the power of the State to regulate and the business of operating a place of public amusement.

In *Jones* v. *Broadway Roller Rink Co.* (136 Wis. 595; 118 Northwestern 170, 172), the Court said:

> "Public accommodation and amusement is the test prescribed by our statute. The amusement offered by the usual skating rink is to the public as such and generally. It differs radically from the tender of accommodation offered by the ordinary merchant or professional man who, while he impliedly, by opening the door of his shop or office, invites everyone to enter, does so only for the purpose of selling to each individually either service or merchandise. This distinction has been often noted."

In *People ex rel. Cort Theater Co.* v. *Thompson* (238 Ill. 87; 119 Northeastern Reporter 41, 45), the language of the Court was:

> "The question here is whether the Constitution protects a theatre owner in a scheme by which an applicant for a ticket is told that the house is sold out, and upon going to the ticket scalper is permitted to select the part of the house where he desires to sit and the ticket scalper turns to the telephone and directs the theatre to send up a ticket, which is sent and sold at an advanced price.
>
> The business of the theatre owner or manager is private in the sense that no franchise from the state is required, but it is no more private than the business of hawkers, peddlers, pawnbrokers, keepers of ordinaries, circuses, or other shows, and amusements

> which invite the public generally to attend and exist entirely by the public. A place of amusement to which the public are generally invited upon no condition but the payment of a fixed charge is public in a general sense, and it differs radically from accommodations offered by a merchant or professional man, who, while he invites every one to enter, does so only for the purpose of selling to each individual services or merchandise. Jones *v.* Roller Skating Rink, 136 Wis. 595, 118 N. W. 170, 19 L. R. A. (N. S.) 907."

See also:

> *Goff* v. *Savage*, 122 Wash. 194; 210 Pacific Reporter 374, 375;
> *Brown* v. *J. H. Bell & Co.*, 146 Ia. 89; 123 Northwestern Reporter 231, 235.

The decision of the United States Supreme Court in *Adkins* v. *Children's Hospital*, (261 U. S. 525) as to the Minimum Wage Act, it is submitted is not applicable to the case at bar. The question involved in those cases is stated as follows by the Court at page 539:

> "The question presented for determination by these appeals is the constitutionality of the act of September 19, 1918, providing for the fixing of minimum wages for women and children in the District of Columbia. 40 Stat. 960 c. 174."

It is apparent from the following excerpts of the majority opinion that the question did not arise as to the reasonableness of a rate fixed by the Legislature as to a business affected with a public interest. The Court said at page 546:

> "There is, of course, no such thing as absolute freedom of contract. It is subject to a

great variety of restraints. But freedom of contract is, nevertheless, the general rule and restraint the exception; and the exercise of legislative authority to abridge it can be justified only by the existence of exceptional circumstances. Whether these circumstances exist in the present case constitutes the question to be answered. It will be helpful to this end to review some of the decisions where the interference has been upheld and consider the grounds upon which they rest:

1. *Those dealing with statutes fixing rates and charges to be exacted by business impressed with a public interest.*

There are many cases, but it is sufficient to cite *Munn* v. *Illinois*, 94 U. S. 113. The power here rests upon the ground that where property is devoted to a public use the owner thereby, in effect, grants to the public an interest in the use, which may be controlled by the public for the common good to the extent of the interest thus created. It is upon this theory that these statutes have been upheld and, it may be noted in passing, so upheld even in respect of their incidental and injurious or destructive effect upon pre-existing contracts. See *Louisville and Nashville Railway Company* vs. *Motley*, 219 U. S. 467. In the case at bar the statute does not depend upon the existence of a public interest in any business to be affected, and this class of cases may be laid aside as inapplicable."

At page 554, the Court further stated:

"If now, in the light furnished by the foregoing exceptions to the general rule forbidding legislative interference with freedom of contract, we examine and analyze the statute in question, we shall see that it differs from them in every material respect. It is not a

> law dealing with any business charged with a public interest or with public work, or to meet and tide over a temporary emergency. It has nothing to do with the character, methods or periods of wage payments. It does not prescribe hours of labor or conditions under which labor is to be done. It is not for the protection of persons under legal disability or for the prevention of fraud. It is simply and exclusively a price-fixing law, confined to adult women (for we are not now considering the provisions relating to minors), who are legally as capable of contracting for themselves as men. It forbids two parties having lawful capacity—under penalties as to the employer—to freely contract with one another in respect of the price for which one shall render service to the other in a purely private employment where both are willing, perhaps anxious, to agree, even though the consequence may be to oblige one to surrender a desirable engagement and the other to dispense with the services of a desirable employee."

The minimum wage law did not deal "with any business charged with a public interest." It was not confined to kinds of business where it is recognized that it is proper under the police power to impose a license as a condition to engage in the business. There was no evidence that there was a monopoly warranting regulation by law. It was not, the Court says, "for the prevention of fraud."

In all these important particulars it differed from the case at bar.

In *Radice* v. *The People of the State of New York* (264 U. S. 292), the Court referred to *Adkins* v. *Children's Hospital, supra,* stating at page 295:

> "The statute in the Adkins Case was a wage-fixing law pure and simple. It had

> nothing to do with the hours or conditions of labor. We held that it exacted from the employer 'an arbitrary payment for a purpose and upon a basis having no causal connection with the business, or the contract or the work' of the employee * * *."

In *Charles Wolff Packing Company* v. *Court of Industrial Relations of the State of Kansas* (262 U. S. 522), the Court considered the validity of the "Court of Industrial Relations Act of Kansas" and the conclusion of the Court as announced by the Chief Justice was (at p. 544):

> "We think the Industrial Court Act in so far as it permits the fixing of wages in plaintiff in error's packing house, is in conflict with the Fourteenth Amendment, and deprives it of its property and liberty of contract without due process of law."

At pages 535 and 536 of the opinion the Court gave the following classification of the different kinds of businesses clothed with a public interest:

> "Businesses said to be clothed with a public interest justifying some public regulation may be divided into three classes:
>
> (1) Those which are carried on under the authority of a public grant of privileges which either expressly or impliedly imposes the affirmative duty of rendering a public service demanded by any member of the public. Such are the railroads, other common carriers and public utilities.
>
> (2) Certain occupations, regarded as exceptional, the public interest attaching to which, recognized from earliest times, has survived the period of arbitrary laws by Parliament or Colonial legislatures for regulating all trades and callings. Such are those of the keepers of inns, cabs and gristmills. * * *

(3) Businesses which though not public at their inception may be fairly said to have risen to be such and have become subject in consequence to some government regulation. They have come to hold such a peculiar relation to the public that this is superimposed upon them. In the language of the cases, the owner by devoting his business to the public use in effect grants the public an interest in that use, and subjects himself to public regulation to the extent of that interest although the property continues to belong to its private owner and to be entitled to protection accordingly. * * *.

It is manifest from an examination of the cases cited under the third head that the mere declaration by a legislature that a business is affected with a public interest is not conclusive of the question whether its attempted regulation on that ground is justified. The circumstances of its alleged change from the status of a private business and its freedom from regulation into one in which the public have come to have an interest are always a subject of judicial inquiry.

In a sense, the public is concerned about all lawful business because it contributes to the prosperity and well being of the people. The public may suffer from high prices or strikes in many trades, but the expression 'clothed with a public interest', as applied to a business, means more than that the public welfare is affected by continuity or by the price at which a commodity is sold or a service rendered. The circumstances which clothe a particular kind of business with a public interest, in the sense of *Munn* v. *Illinois* and the other cases, must be such as to create a peculiarly close relation between the public and those engaged in it, and raise implications of an affirmative obligation on their part to be reasonable in dealing with the public."

At page 538, the Court further said:

> "In nearly all the businesses included under the third head above, the thing which gave the public interest was the indispensable nature of the service and the exorbitant charges and arbitrary control to which the public might be subjected without regulation. In the preparation of food, the changed conditions have greatly increased the capacity for treating the raw product and transferred the work from the shop with few employees to the great plant with many. Such regulation of it as there has been, has been directed toward the health of the workers in congested masses, or has consisted of inspection and supervision with a view to the health of the public. But never has regulation of food preparation been extended to fixing wages or the prices to the public, as in the cases cited above where fear of monopoly prompted, and was held to justify, regulation of rates. There is no monopoly in the preparation of foods. The prices charged by plaintiff in error are, it is conceded, fixed by competition throughout the country at large. Food is now produced in greater volume and variety than ever before."

Attention in particular is called to the statement of the Court, "There is no monopoly in the preparation of foods." It does not appear that the statute in the above case was to correct abuses, to protect the public from "exorbitant charges and arbitrary control," (see page 538), nor to prevent fraud.

It is submitted that the theatre business according to the record in the case at bar comes squarely within the third class of kinds of busi-

ness "clothed with a public interest" according to the classification of *Wolff Co.* v. *Industrial Court, supra.*

At page 538, the Court says:

> "In nearly all of the businesses included under the third head above, the thing which gave the public interest was the indispensable nature of the service and the exorbitant charges and arbitrary control to which the public might be subjected without regulation."

The business of conducting a theatre is so concerned with the amusement, recreation and education of the people that it can be likewise said "the thing which gave the public interest was the indispensable nature of the service." Again "the exorbitant charges and arbitrary control to which the public" not only "might be" but are "subjected without regulation" clothes the theatre business "with a public interest."

No doubt there is confusion in the cases as to when a business is affected with a public interest.

*There is no arbitrary formula which solves this question. The meaning of this expression "affected with a public interest" depends upon the nature of the business, how it comes in contact with the public and the evils either actually associated with the business or reasonably feared.*

This expression "affected with a public interest" means one thing in connection with the business of a common carrier, it may have a narrower meaning as applied to the business of insurance. It may have one meaning as to the regulation of the business of an innkeeper, its

meaning in reference to the business of a theatre may be broader.

This distinction is clearly brought out in *Chas. Wolff Packing Company* v. *Court of Industrial Relations of the State of Kansas, supra,* at pages 538, 539 and 540 the Court said:

> "It is very difficult under the cases to lay down a working rule by which readily to determine when a business has become 'clothed with a public interest.' All business is subject to some kinds of public regulation; but when the public becomes so peculiarly dependent upon a particular business that one engaging therein subjects himself to a more intimate public regulation is only to be determined by the process of exclusion and inclusion and to gradual establishment of a line of distinction. We are relieved from considering and deciding definitely whether preparation of food should be put in the third class of quasi-public businesses, noted above, because even so, the valid regulation to which it might be subjected as such, could not include what this act attempts.
>
> To say that a business is clothed with a public interest, is not to determine what regulation may be permissible in view of the private rights of the owner. The extent to which an inn or a cab system may be regulated may differ widely from that allowable as to a railroad or other common carrier. It is not a matter of legislative discretion solely. It depends on the nature of the business, on the feature which touches the public, and on the abuses reasonably to be feared. To say that a business is clothed with a public interest is not to import that the public may take over its entire management and run it at the expense of the owner. The extent to which regulation may reasonably go varies

with different kinds of business. The regulation of rates to avoid monopoly is one thing. The regulation of wages is another. A business may be of such character that only the first is permissible, while another may involve such a possible danger of monopoly on the one hand, and such disaster from stoppage on the other, that both come within the public concern and power of regulation.

If, as, in effect, contended by counsel for the State, the common callings are clothed with a public interest by a mere legislative declaration, which necessarily authorizes full and comprehensive regulation within legislative discretion, there must be a revolution in the relation of government to general business. This will be running the public-interest argument into the ground, to use a phrase of Mr. Justice Bradley when characterizing a similarly extreme contention. *Civil Rights Cases*, 109 U. S. 3, 24. It will be impossible to reconcile such result with the freedom of contract and of labor secured by the 14th Amendment."

It is instructive to apply the above doctrine to a comparison of some of the cases discussing the nature of the business of operating a theatre.

In *Aaron* v. *Ward* (203 N. Y. 351, 356) the Court said that the "business of maintaining a theater cannot be said to be 'strictly' private." The Court further stated, referring to *People* v. *King* (110 N. Y. 418), that a statute securing "equal enjoyment of any accommodation, facilities and privileges of inns, common carriers, theaters or other places of public resort or amusement regardless of race, creed or color" was upheld "on the ground that under the doctrine of *Munn* v. *Illinois* (94 U. S. 113) theaters and places of pub-

lic amusement (the case before the Court was that of a skating rink) *were affected with a public interest which justified legislative regulation and interference.*" (Italics ours.)

On the other hand in *Woollcott* v. *Shubert* (217 N. Y. 212, 216) while the Court admitted that a theatre was "affected by a public interest which justified licensing under the police power or for the purpose of revenue," held that it was "in no sense public property or a public enterprise" and therefore at common law the proprietor could decide "who shall be admitted or excluded."

An analysis of these cases demonstrates that the meaning of "affected with a public interest" as applied to theatres as well as other kinds of business depends "on the feature which touches the public, and on the abuses reasonably to be feared" (See *Wolff Co.* v. *Industrial Court, supra,* at page 539).

When there is a monopoly, when the purpose is to safeguard "the public against fraud, extortion, exorbitant rates and similar abuses," when there are not only "abuses" which are "reasonably to be feared" but "abuses" that actually exist, then certainly the business is "affected with a public interest" and comes within the police power for the purpose of regulation. Otherwise it must result that the State is powerless to accomplish those purposes for which governments are founded.

**f.** *The restriction that no licensee shall resell a ticket "at a price in excess of fifty cents in advance of the price printed on the face of such ticket" is reasonable.*

The fixing of a rate is a legislative function and as applied to those carrying on a business that is affected with a public interest will be upheld, if it is reasonable.

*Chicago &c. Railway Co.* v. *Wellman*, 143 U. S. 339, 344;
*Reagan* v. *Farmers' Loan & Trust Co.*, 154 U. S. 362, 398;
*Ratcliff* v. *Wichita Union Stockyards Co.*, 74 Kans. 1; 86 Pacific Reporter 150, 154.

Assuming that the Court can in this action inquire into the question whether the above excess price provision is reasonable, the price established by the legislature is "at least *prima facie* evidence of what is reasonable and just."

See:

*Reagan* v. *Farmers' Loan & Trust Co.*, 154 U. S. 362, 395.

Further, conceding the evidence introduced by the defendant is true and relevant, it does not overcome the presumption in favor of the reasonableness of the excess price fixed by the Legislature.

David Marks, a witness for the defendant, testified that the brokerage business in which he was interested sold over three hundred thousand tickets a year and "made a good comfortable living," but had not taken out a license (Record, p. 14, fol. 25).

The witness further testified as to the profit that his concern made:

"Q. Do you have an established rate of profit? A. *It is fifty cents, we are not allowed to charge more.*

Q. You have charged more in some cases? A. We charge fifty cents for every ticket we handle.

Q. What you have said as to the method of doing business is practically the same in all cases? A. Yes, sir.

Q. Are there cases when you do charge more than fifty cents? A. Yes, sir.

Q. Explain? A. If a customer insists upon two tickets or four tickets for a certain attraction and we have not got them, and the customer requests or suggests that we go out and purchase them outside, we do that, and in that case we pay the market price and still add fifty cents for our service" (Record, p. 9, fols. 16, 17).

"Q. About how many would you buy at the market price? A. Sometimes ten or twenty a day and sometimes none.

Q. About how many out of the 300,000 seats that you sell? A. I don't think it would not exceed five or ten thousand. We have a very short season, it only extends six months" (Record, p. 16, fol. 28).

It is clear from this testimony that a profit of 50 cents on a ticket was adequate so far as this house was concerned and the members were enabled to make "a good comfortable living."

The witness testified as follows in regard to the business of "McBride":

"Q. McBride is one of the largest? A. Yes, sir.

Q. And he sells approximately how many tickets a year? Five hundred thousand tickets a year? A. I think so.

Q. *And his rate is fifty cents over the*

*amount printed on the ticket?* A. *Yes, sir.*

Q. He has not gone into bankruptcy? A. Not that I heard of.

Q. He has been doing business for forty-five years? A. Yes, sir" (Record, pp. 14, 15, fol. 25).

The affidavit of John McBride sworn to the 21st of January, 1919, offered by the People and received in evidence without objection (Record, p. 16, fol. 28; pp. 24, 25, fols. 41, 42), stated:

> "that the said business was established by deponent's father, Thomas J. McBride, 45 years ago, and has continued in business without interruption since its establishment; and that deponent has been associated in this business with his father from 1894 to date, a period of 25 years; that during this entire period of time it has been the policy of the McBride Company to only charge their patrons 50 cents higher than the box office prices on each ticket sold, except on occasions when the McBride Agency did not have the tickets desired, in which case customers were warned if they insisted on purchasing through the McBride Agency particular tickets it would be necessary to buy them in the open market or some other speculator, and that they would be charged 50 cents over the price paid to the other speculator or in the open market. Ninety-eight per cent. of the business has been conducted on a 50 cent increase over box office rates basis, the exception in the overcharge of prices above mentioned occurring very seldom. The deponent's company sells approximately 500,000 tickets per year. *The policy of charging a brokerage fee of 50 cents on each ticket sold by deponent's company has resulted in the growth and development of a profitable business enterprise and which enterprise is now thriving, and the volume of business increasing from year to year.*"

As to this matter, the Court below stated:

> "The sole question which we must still consider is whether the regulation of the Legislature is reasonable. The statute does *not forbid the ticket brokers from* exercising their lawful business nor from rendering the same service to the public as they have previously rendered, and in this respect the statute differs from the statutes or ordinances condemned by the courts of Illinois and California in the cases cited above. It permits the brokers to charge an advance of 50 cents above the price charged by the managers of the theatre, and there is some evidence from which it might be inferred that this charge would afford reasonable compensation for the services rendered by them, and that it represents the usual profit made by those conducting the business on a considerable scale."
>
> *People* v. *Weller*, 237 N. Y. 316, 330.

In *Opinion of Justices to Senate* (247 Mass. 589, 598), it is said:

> "In view of the prices commonly charged for tickets of admission to theaters and places of amusement, we are of opinion that a limitation of additional price on resale to a sum not exceeding 50 cents on each ticket cannot be pronounced unreasonable."

It is true that David Marks, the witness for the defendant, testified that the ticket sellers who did not have a large business had to charge an excess of more than 50 cents on a ticket to "exist" (Record, p. 12, fol. 21).

It does not follow because some persons who have invested their money in the business of ticket selling can not carry on their business at

a profit unless they charged an excess price of more than 50 cents on a ticket, that therefore the rate established by the statute is unfair and unreasonable. Their methods of carrying on business may be unwise, they may have been extravagant. See

*Reagan* v. *Farmers' Loan & Trust Co.*, 154 U. S. 362, 412;

*Ratcliff* v. *Wichita Union Stockyards Co.*, 74 Kans. 1; 86 Pacific Reporter 150, 154.

In *State* v. *Hall*, (190 Northwestern Reporter 457, 458 [Wis.]), it is stated:

> "The constitutionality of laws does not depend upon such fortuitous circumstances. It is a well established principle of law that the constitutionality of an act cannot be tested by the evidence in the particular case."

See also

*City of St. Louis* v. *Liessing*, 89 Southwestern Reporter 611, 613, 614 (Mo.).

Therefore, as in the case at bar there is a "real, substantial evil of public interest to be guarded against" and there is a "reasonable relation between the evil and the purported cure or prevention offered by the statute" the whole statute, it is submitted, is constitutional. (See *People* v. *Charles Schweinler Press*, 214 N. Y. 395, 407.)

In *People* v. *Charles Schweinler Press*, *supra*, at page 406, the Court said:

> "The legislature was justified in preventing any such evils as those which were out-

lined, both real and fairly to be anticipated, by any legislation which reasonably tended to prevent them, and it had a wide discretion in formulating the means which it would adopt to this end."

## POINT III.

**The price restriction provision of the statute is not so essentially a part of it that the validity of the statute must necessarily depend upon the validity of that provision.**

There is nothing to indicate that the Legislature would not have passed the statute or would not have undertaken to require persons engaged in the business of selling theatre tickets to obtain licenses unless there was coupled with it a provision restricting the price of tickets. The part of the statute restricting the price which the broker may charge for a ticket is clearly separable from the general licensing feature. Hence, the validity or invalidity of the statute as a whole is not to be determined by determining the validity or invalidity of the price restriction provision.

In 6 R. C. L., "Constitutional Law", §121, it is said:

> "It is a fundamental principle that a statute may be constitutional in one part and unconstitutional in another part, and that if the invalid part is severable from the rest the portion which is constitutional may stand while that which is unconstitutional is stricken out and rejected; but where it is not possible to separate that which is unconstitutional from the rest of the act, then the whole

statute falls. If after eliminating the invalid portions, the remaining provisions are sufficient to be operative and accomplish their proper purpose, it does not necessarily follow that the whole act is void. The constitutional and unconstitutional parts should be severable so that the valid portion may be read and may stand by itself. In determining the question whether the parts of a statute are severable within the meaning of this principle, the court acts by inspection of the statute. The constitutional and unconstitutional provisions of a statute may be included in one and the same section and yet be separable, so that some stand while others fall. It has also been recognized that a preamble of an act may be severed from the rest of a statute. In view of the established custom of judicial tribunals of avoiding the determination of questions as to the constitutionality of statutes except when necessary in deciding litigated cases, the courts will decline as a rule to decide whether a particular provision of a statute is unconstitutional, where they are of the opinion that if such provision is in fact invalid it may be severed from the remaining provisions of a statute, the validity of which alone is necessarily before the court."

In *Ashley v. Justices of Superior Court* (228 Mass. 63, 81), Rugg, C. J., said:

"It is a well settled principle of constitutional law that one part of a statute may be contrary to the Constitution, while the rest may stand as valid, provided the two parts are distinct and in their nature separable the one from the other and are not so interwoven and mutually dependent as to require the belief that the Legislature would not have enacted the one without the other."

See also:

*Dollar Co.* v. *Canadian C. & F. Co.*, 220 N. Y. 270, 278.

In *State* v. *Gordon*, (268 Mo. 713; 188 Southwestern 160, 164), the Court announced the rule as follows:

> "That, if, after cutting out and throwing away the bad parts of a statute enough remains which is good to clearly show the legislative intent and to furnish sufficient details of a working plan by which that intention may be made effectual, then we ought not, as a matter of law, to declare the whole statute bad."

In *Brazee* v. *Mich.* 241 U. S. 340, 344), a statute regulating employment agencies and requiring those engaged in conducting such a business to obtain a license and pay a fee therefor was sustained. The Act contained provisions respecting the fees that might be lawfully charged. Respecting this provision, the Court said:

> "Provisions of §5 in respect of fees to be demanded or retained are severable from other portions of the act and, we think, might be eliminated without destroying it."

Authorities to this effect might be multiplied indefinitely. The principle is elementary. It is only when the bad part is so deeply woven into the whole scheme and purpose of the law that the whole law must fall with it. It must appear that without the alleged bad part the law would not have been enacted at all to justify an annulment of the whole law because of the bad part (*Pollock* v. *Farmers L. & T. Co.*, 158 U. S. 601, 635-637),

If, after eliminating the alleged bad part, a purpose can be discerned in the rest of the law which goes to carry out a public end the invalid feature may be rejected and the rest of the law permitted to remain.

If, in the case at bar, the statute had consisted of two parts entirely separate and distinct, one providing for licensing ticket sellers and the other providing for restriction as to price of tickets, there would be no question but that the statute might be upheld as to the one part and might fall as to the other. (*Dollar Co.* v. *Canadian C. & F. Co.*, 220 N. Y. 270, 278; *Dorchy* v. *State of Kansas*, 264 U. S. 286). In the present statute the price restriction part may be cut out and yet there will remain sufficient provisions for a working plan to license ticket sellers. In §169 the part as to excess of price might be eliminated and yet enough would remain to provide for giving a bond. In §170 the provision as to excess of price might be rejected and yet other grounds would remain for revocation of licenses.

In the case of *Hauser* v. *North British and Mercantile Ins. Co.* (152 App. Div. 91, aff'd 206 N. Y. 455) the condition held to be invalid was "the only condition imposed" while in the above sections the restriction as to price is not the only provision contained therein.

In *Loeb* v. *Columbia Township Trustees* (179 U. S. 472, 490), the court said:

> "As one section of a statute may be repugnant to the Constitution without rendering the whole act void, so, one provision of a section may be invalid by reason of its not conforming to the Constitution, while all the

> other provisions may be subject to no constitutional infirmity. One part may stand, while another will fall, unless the two are so connected, or dependent on each other in subject matter, meaning or purpose, that the good cannot remain without the bad. The point is, not whether the parts are contained in the same section, for, the distribution into sections is purely artificial; but whether they are essentially and inseparably connected in substance—whether the provisions are so interdependent that one cannot operate without the other."

But assuming that the price restriction feature is so interwoven in these two sections (169 and 170) as to make it impossible to cut out this restriction without destroying the sections yet a workable plan would remain. Section 168 of the statute may stand complete in itself as to the granting of a license and at common law it would be implied that the officer or board that had power to grant a license would have power also to revoke it (*People ex rel. Lodes* v. *Dept. of Health*, 189 N. Y. 187, 190, 197). Therefore it is evident that the two features "are not so interwoven and mutually dependent as to require the belief that the Legislature would not have enacted the one without the other" (See Ashley *v.* Justices of Superior Court, 228 Mass. 63, 81; Brazee *v.* Michigan, 241 U. S. 340, 344).

In *People ex rel. Alpha P. C. C. Co.* v. *Knapp*, (230 N. Y. 48, 60), the language of the Court was:

> "In this state, we have gone far in subdividing statutes, and sustaining them so far as valid (*Dollar Co.* v. *Canadian C. & F. Co.*, 220 N. Y. 270, 278, and cases there cited; *People* v. *Beakes Dairy Co.*, 222 N. Y. 416,

> 432; *People ex rel. Penn. Gas Co.* v. *Saxe,* 229 N. Y. 446). The tendency is, I think, a wholesome one. Severance does not depend upon the separation of the good from the bad by paragraphs or sentences in the text of the enactment. * * * The principle of division is not a principle of form. It is a principle of function. The question is in every case whether the legislature, if partial invalidity had been foreseen, would have wished the statute to be enforced with the invalid part exscinded, or rejected altogether."

Counsel for the appellant cites *Lemke* v. *Farmers Grain Co.,* 258 U. S. 50. At page 60 of that opinion the Court says:

> "It is insisted that the price fixing feature of the statute may be ignored, and its other regulatory features of inspection and grading sustained if not contrary to valid federal regulations of the same subject. But the features of this act, clearly regulatory of interstate commerce, are essential and vital parts of the general plan of the statute to control the purchase of grain and to determine the profit at which it may be sold. It is apparent that without these sections the state legislature would not have passed the act. Without their enforcement the plan and scope of the act fails of accomplishing its manifest purpose. We have no authority to eliminate an essential feature of the law for the purpose of saving the constitutionality of parts of it. *International Textbook Co.* v. *Pigg,* 217 U. S. 91, 113, and cases cited."

It will be observed that the Court says that in this case it is apparent that without the unconstitutional provisions "the state legislature would not have passed the act." In the case at

bar the legislature expressly declares its intention. It states that although it be determined that any section is unconstitutional "*such determination shall not affect the validity or effect of the remaining provisions of this article*" (§174).

In the case at bar there is a very clear indication of the intent of the legislature that is lacking in most if not all the cases heretofore cited. The legislature has very positively declared its intention that even if the price restriction provision is invalid nevertheless the rest of the statute should be held constitutional. The statute contains the following provision:

> "*§174. Constitutionality of article. In case it be judicially determined that any section of this article is unconstitutional or otherwise invalid, such determination shall not affect the validity or effect of the remaining provisions of this article.*"

In Ruling Case Law (Vol. 6, §123) it is stated:

> "Occasionally the legislature expressly states its will that the valid provisions of a statute shall be enforced in spite of any judicial determination that certain sections of the act are unconstitutional. Such an expression of the will of the legislature is generally carried out by the courts."

In *State* v. *Clausen* (65 Wash. 156; 117 Pacific Reporter 1101, 1114), the Court in construing such a provision stated:

> "It is there expressly provided that the adjudication of invalidity of any part of the act shall not affect the validity of the act as a whole or any other part thereof. This means that the Legislature intended the act

> to be enforced as far as it may be, even though it might not be valid in its entirety. It was competent for the Legislature so to provide. Anything it could have eliminated itself and left an operative act can be eliminated by the courts without destroying the entire act, if it is the will of the legislature that the remaining parts of the act shall stand after such elimination."

See:

*People ex rel. Stafford* v. *Travis*, 231 N. Y. 339, 348, 349;
*Dorchy* v. *State of Kansas*, 264 U. S. 286.

Section 22 of the "Lever Act" (Act of Congress, Aug. 10, 1917, ch. 53) contains a provision similar to section 174, *supra*, in that it provides that if part of the statute be adjudged invalid such determination shall not affect the rest of the statute.

In two recent cases this section has been considered.

In *Baird* v. *United States* (279 Fed. Rep. 509, 511), the Circuit Court of Appeals said:

> "While the price-fixing provision of section 4 of the Lever Act (Comp. St. 1918, Comp. St. Ann. Supp. 1919, §3115⅛ff) has been declared unconstitutional (United States *v.* Cohen Co., 255 U. S. 81, 41 Sup. Ct. 298, 65 L. Ed. 516, 14 A. L. R. 1045), such declaration does not affect the validity of section 15 (Comp. St. §3115⅛l). See in this connection the express provision in section 22 of the act (Comp. St., §3115⅛°°)."

In *Lajoie* v. *Milliken* (242 Mass. 508; 136 N. E. Rep. 419, 424), Chief Justice Rugg said in discussing the "Lever Act":

> "There seems to us to be nothing at variance with this conclusion in United States *v.* Cohen Grocery Store Co., 255 U. S. 81, 41 Sup. Ct. 298, 65 L. Ed. 516, 14 A. L. R. 1045. The part of the Lever Act there held violative of the guaranties of the Fifth and Sixth Amendments to the United States Constitution, *are separable from the provisions* here invoked. Ashley *v.* Three Justices of the Superior Court, 228 Mass. 63, 81, 116 N. E. 961, 8 A. L. R. 1463, and cases there collected; Reagan *v.* Farmers' Loan & Trust Co., 154 U. S. 362, 395, 14 Sup. Ct. 1047, 38 L. Ed. 1014. Moreover, it was the intent of Congress as declared by section 22 of the act (section 3115⅛°°) that no unconstitutional provisions therein should taint in any particular other parts not in themselves violative of constitutional guaranties."

Counsel for appellant cites *Hill* v. *Wallace*, 259 U. S. 44.

A suit was brought attacking the validity of the Act of Congress known as the "Future Trading Act," approved August 24, 1921. The act imposed a tax of 20 cents a bushel on all contracts for the sale of grain for future delivery, with certain exceptions. The Court held that the act could not be sustained as an exercise of the taxing power of Congress. It was then sought to sustain the act under the power of Congress to regulate interstate commerce. But as there was no reference in the act to interstate commerce the Court held it had no power to insert limitations not contained in the act.

At page 68 the Court said:

> "We come to the question then, Can these regulations of boards of trade by Congress be sustained under the commerce clause of the Constitution? Such regulations are held to be within the police powers of the State. *House* v. *Mayes*, 219 U. S. 270; *Brodnax* v. *Missouri*, 219 U. S. 285. There is not a word in the act from which it can be gathered that it is confined in its operation to interstate commerce. The words '*interstate commerce*' are not to be found in any part of the act from the title to the closing section. The transactions upon which the tax is to be imposed, the bill avers, are sales made between members of the Board of Trade in the City of Chicago for future delivery of grain, which will be settled by the process of offsetting purchases or by a delivery of warehouse receipts of grain stored in Chicago. Looked at in this aspect and without any limitation of the application of the tax to interstate commerce, or to that which the Congress may deem from evidence before it to be an obstruction to interstate commerce, we do not find it possible to sustain the validity of the regulations as they are set forth in this act. A reading of the act makes it quite clear that Congress sought to use the taxing power to give validity to the act. It did not have the exercise of its power under the commerce clause in mind and so did not introduce into the act the limitations which certainly would accompany and mark an exercise of the power under the latter clause."

It was sought to uphold the Act of Congress on the ground that it contained a section which directed, if a provision of the act was invalid, the validity of the remainder should not be affected thereby.

At page 70, the Court said:

"Section 11 of this act directs that 'if any provision of this Act or the application thereof to any person or circumstances is held invalid, the validity of the remainder of the Act and of the application of such provision to other persons and circumstances shall not be affected thereby.'

Section 4 with its penalty to secure compliance with the regulations of Boards of Trade is so interwoven with those regulations that they can not be separated. None of them can stand. Section 11 did not intend the court to dissect an unconstitutional measure and reframe a valid one out of it by inserting limitations it does not contain. This is legislative work beyond the power and function of the court. In *United States* v. *Reese*, 92 U. S. 214, presenting a similar question as to a criminal statute, Chief Justice Waite said (p. 221):

'We are not able to reject a part which is unconstitutional, and retain the remainder, because it is not possible to separate that which is unconstitutional, if there be any such, from that which is not. The proposed effect is not to be attained by striking out or disregarding words that are in the section, but by inserting those that are not now there. Each of the sections must stand as a whole, or fall together. The language is plain. There is no room for construction, unless it be as to the effect of the Constitution. The question, then, to be determined, is, whether we can introduce words of limitation into a penal statute so as to make it specific, when, as expressed, it is general only. . . . To limit this statute in the manner now asked for would be to make a new law, not to enforce an old one. This is no part of our duty.'

*Trade-Mark Cases*, 100 U. S. 82; *Butts* v. *Merchants & Miners Transportation Co.*, 230 U. S. 126.

> To be sure in the cases cited there was no saving provision like §11, and undoubtedly such a provision furnishes assurance to courts that they may properly sustain separate sections or provisions of a partly invalid act without hesitation or doubt as to whether they would have been adopted, even if the legislature had been advised of the invalidity of part. But it does not give the court power to amend the act.
>
> There are sections of the act to which under §11 the reasons for our conclusion as to §4 and the interwoven regulations do not apply. Such is §9 authorizing investigations by the Secretary of Agriculture and his publication of results. Section 3, too, would not seem to be affected by our conclusion."

In the case at bar assuming that the provisions as to restriction as to excess of price are unconstitutional, they can be cut out and "enough remains which is good to clearly show the legislative intent and to furnish sufficient details of a working plan by which that intention may be made effectual."

> *State* v. *Gordon*, 268 Mo. 713; 188 Southwestern Reporter 160, 164.

The proposed effect is "to be attained by striking out or disregarding words" that are in the statute. It is not necessary to amend the statute "by inserting" words "that are not now there."

But in *Hill* v. *Wallace*, *supra*, the desired effect could only be attained "by inserting limitations it does not contain."

"The proposed effect is not to be attained by striking out or disregarding words that are in the

section, but by inserting those that are not now there."

In the recent case of *Dorchy* v. *State of Kansas*, 264 U. S. 289, 290, the language of this Court was:

> "A statute bad in part is not necessarily void in its entirety. Provisions within the legislative power may stand if separable from the bad. * * * But a provision, inherently unobjectionable, cannot be deemed separable unless it appears both that, standing alone, legal effect can be given to it and that the legislature intended the provision to stand, in case others included in the act and held bad should fall."

In the case at bar not only inherently unobjectionable provisions can be separated as heretofore indicated, but also it is clear that the legislature "intended" these provisions "to stand."

As cogent evidence of the intention of the Legislature, attention is called to the fact that after it had been held in *People* v. *Newman*, (109 N. Y. Misc. R. 622), that the provisions of the ordinance as to ticket sellers was unconstitutional the Legislature passed two acts as to the sale of tickets to admission to theatres and places of amusement.

The first act passed in 1921 was vetoed by Governor Miller. In his message vetoing this act the Governor called the attention of the Legislature to the opinion in *People* v. *Newman* (109 N. Y. Misc. Rep. 622). In 1922 the Legislature passed the present act which was signed by Governor Miller. (See Brief of plaintiff-in-error, pp. 7-9). It is submitted that this legislation shows a determined purpose to restrain the evils of ticket sell-

ing and to regulate the business so far as the Legislature has the constitutional power.

In view of the history of the statute and the command of the last section thereof, how can there be any doubt that the Legislature, if the statute was in part invalid "wished the statute to be enforced with the invalid part exscinded, or rejected altogether." See:

*People ex rel. Alpha P. C. C. Co.* v. *Knapp*, 230 N. Y. 48, 60.

## POINT IV.

**The provision as to the penalty incurred for a violation of the statute is constitutional.**

The plaintiff in error contends that: (1) "The taking out of a license and the giving of a bond precludes the licensee from subsequently attacking the constitutionality of the statute requiring such license and bond" (Brief of Plaintiff-in-Error, p. 76); and (2) "If the licensing provision of the act standing by itself were constitutional, the defendant can not be charged with a misdemeanor for non-compliance therewith if the price-fixing clauses of the act are invalid and he would be precluded from attacking them, because of his compliance with the licensing provision" (Brief of Plaintiff-in-Error, page 82). Therefore it is claimed that the statute is unconstitutional.

To support the first contention *Musco* v. *United Surety Co.* (196 N. Y. 459), is cited. In that case an action was brought to recover on a bond ex-

ecuted by one Ferrara as principal and the appellant as surety pursuant to the provisions of a statute. Appellant contended that said bond was unconstitutional. The Court said the right to question the constitutionality of the law had been waived. At page 465, the Court stated:

> "The appellant and its principal have waived any question concerning the constitutionality of the act in question. That act in effect prohibited appellant's principal from carrying on the business of receiving deposits unless he should execute an undertaking as therein provided. Conversely, in effect, it authorized him to conduct such business if he should execute such a bond. He very well may have concluded that it would be to his advantage in the conduct of the business to give such an undertaking, whether he could be compelled so to do or not, and he executed one. Having done this and respondent's assignors having made deposits with him, as we must assume, on the faith of such undertaking, neither he nor his surety can now raise the question of constitutionality, for it is well settled that an individual may waive even constitutional provisions for his benefit when no question of public policy or public morals is involved."

It is submitted that, as the rights of innocent parties had intervened, the doctrine of estoppel would preclude the appellant from setting up the unconstitutionality of the bond. Further the Court held the bond was not executed under duress.

It is submitted that, if the defendant in the case at bar had paid the license fee under protest in order to avoid being prosecuted under the stat-

ute, he could have subsequently recovered the money as being paid under duress, and in such an action the constitutionality of the statute could have been passed upon and he would not have been precluded "from subsequently attacking the constitutionality of the statute requiring such license and bond."

*Union Pacific R. R. Co.* v. *Pub. Service Comm.*, 248 U. S. 67;
*Chicago & E. I. Ry. Co.* v. *Miller*, 309 Ill. 257; 140 Northeastern Reporter 823;
*Wheeler* v. *Plumas County*, 149 Cal. 782; 87 Pacific Reporter 802, 804, 805;
*Amer. Coal M. Co.* v. *Special C. and F. Com'n.*, 268 Fed. Rep. 563, 565;
Woodward on Quasi Contracts, §238.

In *Union Pacific R. R. Co.* v. *Pub. Service Comm.*, *supra*, a State exacted an unconstitutional fee for a certificate of authority to issue railroad bonds, under statutes threatening heavy penalties and purporting to invalidate the bonds, and so rendering them unmarketable, if the certificates were not obtained, it was held that application for and acceptance of the certificate, with payment under protest, were made under duress.

At page 70 the Court said:

> "Were it otherwise, as conduct under duress involves a choice, it always would be possible for a State to impose an unconstitutional burden by the threat of penalties worse than it in case of a failure to accept it, and then to declare the acceptance voluntary, as was attempted in *Atchison, Topeka & Santa Fe Ry. Co.* v. *O'Connor*, 223 U. S. 280."

In *Chicago & E. I. Ry. Co.* v. *Miller, supra,* (Decided June 20, 1923. Rehearing Denied Oct. 4, 1923), a railroad desiring to issue stock in compliance with a statute secured permission to do so from the proper authority and paid a fee required to be paid, it was held that it was not thereafter precluded from asserting the invalidity of the statute and demanding a return of the fee paid.

At pages 824 and 825 the Court said:

> "Where a person voluntarily accepts the benefits of a statute, he will, as a general rule, thereafter be precluded from challenging its validity, if no question of public policy or public morals is involved. *Grand Rapids & Indiana Railway Co.* v. *Osborn,* 193 U. S. 17, 24 Sup. Ct. 310, 48 L. Ed. 598; *Musco* v. *United Surety Co.,* 196 N. Y. 459, 90 N. E. 171, 134 Am. St. Rep. 851. Before there can be an estoppel, the acceptance of the benefits of the statute must be voluntary. So where money is paid under pressure of severe statutory penalties or disastrous effect to business, it is held that the payment is involuntary and that the money may be recovered. *Gaar, Scott & Co.* v. *Shannon,* 223 U. S. 468, 32 Sup. Ct. 236, 56 L. Ed. 510; *Robertson* v. *Frank Bros. Co.,* 132 U. S. 17, 10 Sup. Ct. 5, 33 L. Ed. 236; *Swift & Courtney & Beecher Co.* v. *United States,* 111 U. S. 22, 4 Sup. Ct. 244, 28 L. Ed. 341. It is reasonable that a man who denies the legality of a tax should have a clear and certain remedy. It is true that appellee chose to comply with the plain provisions of the Public Utilities Act rather than suffer the losses certain to follow in an effort to market the stock and bonds without the approval of the Commerce Commission, but this does not make its act voluntary. Con-

duct under duress always involves a choice, but this court has held that the making of a choice under such circumstances does not estop the person acting under duress from later asserting his rights. *Spaids* v. *Barrett*, 57 Ill. 289, 11 Am. Rep. 10; *Chicago & Alton Railroad Co.* v. *Chicago, Vermilion & Wilmington Coal Co.*, 79 Ill. 121; *Pemberton* v. *Williams*, 87 Ill. 15. In *Atchison, Topeka & Santa Fe Railway Co.* v. *O'Connor*, 223 U. S. 280, 32 Sup. Ct. 216, 56 L. Ed. 436, Ann. Cas. 1913C, 1050, the company brought an action to recover a capital stock tax paid under protest. In disposing of the point the court said:

'In this case the law, besides giving an action of debt to the state, provides that every corporation that fails to pay the tax shall forfeit its right to do business within the state until the tax is paid, and also shall pay a penalty of 10 per cent., for every six months or fractional part of six months of default after May 1 of each year. It may be that the forfeiture of the right to do business would not be authoritatively established, except by a quo warranto provided for in a following section; but before or without the proceeding the effect of the forfeiture clause upon the plaintiff's subsequent contracts and business might be serious. * * * and in any event the penalty would go on accruing during all the time that might be spent before the validity of the defense could be adjudged. As appears from the decision below, the plaintiff could have had no certainty of ultimate success, and we are of opinion that it was not called upon to take the risk of having its contracts disputed and its business injured and of finding the tax more or less nearly doubled in case it finally had to pay. In other words, we are of opinion that the payment was made under duress.'

There seems to us to be no valid distinction between the case at bar and *Union Pacific*

*Railroad Co.* v. *Public Service Com. of Missouri*, 248 U. S. 67, 39 Sup. Ct. 24, 63 L. Ed. 131. In that case, as in this, the railroad company made application to the state commission for authority to issue its bonds for the sole purpose of making them marketable. In allowing recovery of the taxes paid the court said:

'The certificate was a commercial necessity for the issue of the bonds. The statutes, if applicable, purported to invalidate the bonds and threatened grave penalties if the certificate was not obtained. The railroad company and its officials were not bound to take the risk of these threats being verified. Of course, it was for the interest of the company to get the certificate. It always is for the interest of a party under duress to choose the lesser of two evils. But the fact that a choice was made according to interest does not exclude duress.'

The chancellor properly ordered the tax assessed refunded, so the decree of the circuit court is affirmed."

It will be observed that the Illinois Supreme Court in the above case cites the case of *Musco* v. *United Surety Co., supra,* and distinguishes it.

But, assuming that defendant would have waived his right to question the constitutionality of the statute by giving a bond and taking out a license, it does not follow that therefore the statute is unconstitutional.

If such were the law every statute that required one to give a bond and to take out a license before he could begin a new business or continue an old business and, in default thereof imposed penalties, would be illegal.

The plaintiff-in-error to support the doctrine that, by giving a bond and taking out a license, he would waive his right to object to the constitutionality of the statute relies, as stated above, upon *Musco* v. *United Surety Co., supra.*

In that case a statute (Chapter 185, Laws 1907), required that persons engaged in the business of taking deposits of money to transmit to foreign countries before entering into said business or before continuing said business should give a bond for $15,000, to the People of the State of New York "conditioned for the faithful holding and transmission of any money, or the equivalent thereof, which shall be delivered to it or them for transmission to a foreign country." The bond was not to be accepted unless approved by the comptroller and upon approval was to be filed in his office. The statute further provided as to the penalty for a violation:

> "§5. Any corporation, firm or person entering into or continuing in the business aforesaid, contrary to the provisions of this act, shall be guilty of a misdemeanor."

An action was brought to recover on a bond given pursuant to this statute. It was insisted by the appellant that this statute was unconstitutional on certain grounds; but the Court not only stated that the appellant had waived the right to make such an objection, but also said that the objection that the statute was unconstitutional could not be sustained. At page 465 the Court said:

> "But, as stated, if the constitutionality of the statute in question were open to attack by appellant on the grounds stated by it, such attack could not succeed."

A comparison of the statute (Ch. 185, Laws 1907), construed in *Musco* v. *United Surety Co., supra,* with the statute which is to be construed in the case at bar (Ch. 590, Laws 1922) shows that the provisions are similar. In particular, it will be observed that in each statute the only penalty imposed upon the person engaging in or continuing the business in violation of the statute is that he "shall be guilty of a misdemeanor."

In neither statute was there an attempt to intimidate a contest of legality by the severity of the penalties. In neither would agents and servants employed in the business be liable for immense fines. Therefore, it is submitted, if the statute in *Musco* v. *United Surety Co., supra,* was not unconstitutional as debarring the appellant from questioning the validity of its provisions, the statute in the case at bar is not unconstitutional.

Counsel for plaintiff-in-error cites to support his second contention, *Ex parte Young,* 209 U. S. 123.

In that case it was held that a state railroad rate statute which imposed such excessive penalties that parties affected were deterred from testing its validity in the courts, denied the carrier the equal protection of the law without regard to the question of insufficiency of the rates prescribed. A comparison of the penal provision of the statute in the case at bar with the penalties imposed for a violation of the statute involved in *Ex parte Young, supra,* shows a radical difference as to the penal provisions contained in the

two statutes. In *Ex parte Young, supra,* at pages 144-146, the Court says:

> "Another Federal question is the alleged unconstitutionality of these acts because of the enormous penalties denounced for their violation, which prevent the railway company, as alleged, or any of its servants or employés, from resorting to the courts for the purpose of determining the validity of such acts. The contention is urged by the complainants in the suit that the company is denied the equal protection of the laws and its property is liable to be taken without due process of law, because it is only allowed a hearing upon the claim of the unconstitutionality of the acts and orders in question, at the risk, if mistaken, of being subjected to such enormous penalties, resulting in the possible confiscation of its whole property, that rather than take such risks the company would obey the laws although such obedience might also result in the end (though by a slower process) in such confiscation.
>
> * * * * * *
>
> Coming to the inquiry regarding the alleged invalidity of these acts, we take up the contention that they are invalid on their face on account of the penalties. For disobedience to the freight act the officers, directors, agents and employees of the company are made guilty of a misdemeanor, and upon conviction each may be punished by imprisonment in the county jail for a period not exceeding ninety days. Each violation would be a separate offense, and, therefore, might result in imprisonment of the various agents of the company who would dare disobey for a term of ninety days each for each offense. Disobedience to the passenger rate act renders the party guilty of a felony and subject

> to a fine not exceeding five thousand dollars or imprisonment in the state prison for a period not exceeding five years, or both fine and imprisonment. The sale of each ticket above the price permitted by the act would be a violation thereof. It would be difficult, if not impossible for the company to obtain officers, agents or employes willing to carry on its affairs except in obedience to the act and orders in question. The company itself would also, in case of disobedience, be liable to the immense fines provided for in violating orders of the Commission. The company, in order to test the validity of the acts, must find some agent or employé to disobey them at the risk stated. The necessary effect and result of such legislation must be to preclude a resort to the courts (either state or Federal) for the purpose of testing its validity. The officers and employés could not be expected to disobey any of the provisions of the acts or orders at the risk of such fines and penalties being imposed upon them, in case the court should decide that the law was valid. The result would be a denial of any hearing to the company."

In the case at bar, the validity of the act did not depend "upon the existence of a fact which can be determined only after investigation of a very complicated and technical character" (*Ex parte Young, supra,* page 148). The ticket seller is not subjected to "enormous penalties" (*Ex parte Young, supra,* page 145). The only penalty prescribed for engaging in the business without first having procured a license and filing a bond is that the ticket seller will be guilty of a misdemeanor (Section 173). On the other hand, if he takes out a license and files a bond and then

violates the statute, he can only be held in the penal sum of one thousand dollars (Section 169), in addition to being guilty of a misdemeanor.

*Ex parte Young, supra,* has been distinguished in *Rast* v. *Van Deman & Lewis,* 240 U. S. 342.

In the latter case there was involved the validity of a statute of the State of Florida imposing special license taxes upon merchants using profit-sharing coupons and trading stamps. The statute provided that any person "violating any of the provisions of this section whether acting for himself or as the agent of another, shall on conviction thereof be punished by fine not exceeding one thousand ($1,000) dollars or by imprisonment in the county jail not exceeding six months."

The Court refused to apply to the facts in this case the doctrine of *Ex parte Young* that the severity of the penalties was such as to intimidate a contest as to the legality of the statute, and said at page 368:

> "The contention that the statute intimidates against a contest of its legality by the severity of its penalties and is therefore unconstitutional on that ground within the ruling in *Ex parte Young,* 209 U. S. 123, is not justified."

It is submitted that the provision as to a penalty in the statute involved in the case at bar brings it within the decision of *Rast* v. *Van Deman & Lewis, supra,* and that the doctrine of *Ex parte Young, supra,* as to the severity of penalties does not apply.

## POINT V.

**The passage of the statute was a proper exercise of the police power and (1) did not deprive the defendant of liberty or property without due process of law, nor (2) was there denied to the defendant the equal protection of the law.**

In *People ex rel. Durham R. Corp.* v. *La Fetra* (230 N. Y. 429, 442, 443), the police power is defined as follows:

> "The legislative or police power is a dynamic agency, vague and undefined in its scope, which takes private property or limits its use when great public needs require, uncontrolled by the constitutional requirement of due process. Either the rights of property and contract must when necessary yield to the public convenience, advantage and welfare, or it must be found that the state has surrendered one of the attributes of sovereignty for which governments are founded and made itself powerless to secure to its citizens the blessings of freedom and to promote the general welfare."

The language of the Court in *Sligh* v. *Kirkwood* (237 U. S. 52, 59), is:

> "Whether it is a valid exercise of the police power is a question in the case, and that power we have defined as far as it is capable of being defined by general words, a number of times. It is not susceptible of circumstantial precision. It extends, we have said, not only to regulations which promote the public health, morals and safety, but to those which promote the public convenience or the general

> prosperity * * * And further, 'It is the most essential of powers, at times the most insistent, and always one of the least limitable of the powers of government.' "

**a.** Assuming that the business of a theatre ticket broker is not one clothed with a public interest, that the business does not fall within one of the three classes enumerated in *Charles Wolff Packing Company* v. *Industrial Relations of the State of Kansas* (262 U. S. 522, 535, 536).

Assuming further that the criticism of the statute by counsel for the plaintiff-in-error is not without foundation when he said:

> "On the theory of this legislation it would be equally permissible to limit the compensation of lawyers and physicians, of journalists and accountants, of clerks and bookkeepers, the wages of shoemakers and tailors, of carpenters and bricklayers, the commissions of factors and brokers and of agents of every imaginable variety" (at pp. 22-23).

Nevertheless, the evidence is clear and convincing that evils flow from the present system of selling theatre tickets. *People* v. *Thompson*, 238 Ill. 87; 119 Northeastern Reporter, 41, 45, 46.

In *People* v. *Newman* (109 N. Y. Misc. Rep. 622, 660), it was admitted by the Court that there was "evil flowing from this business" and that it "should be corrected."

Abuses frequently result from this business and patrons of theatres suffer imposition.

> *Collister* v. *Hayman*, 183 N. Y. 250, 258.

In the case at bar, the Court of Appeals described the evil as follows:

> "The existence of extortion due to present unregulated conditions in the business of reselling tickets of admission to places of public amusement is widely recognized; the abuse is due to acts of the ticket brokers alone or in conjunction with producers, and these acts are calculated to injure large numbers of the public in connection with a business which is at least to some degree affected with a public interest."
>
> *People* v. *Weller,* 237 N. Y. 316, 331.

The Appellate Division said in regard to the abuses:

> "There seems to be ample evidence that the calling of the ticket speculator has been associated with certain abuses, and all efforts to remedy these, we are told have been in vain. * * * Further evidence of abuses which flow from the business of ticket speculating is furnished by the legislation that has been passed in a number of States, aimed at improving the conditions surrounding the sale and distribution of tickets."
>
> *People* v. *Weller,* 207 N. Y. App. Div. 337, 339, 340.

See also:

> *Opinion of Justices to Senate,* 247 Mass. 589, 596.

The legislature of New York has declared that "the price of or charge for admission to theatres" is "subject to the supervision of the state for the purpose of safeguarding the public

against fraud, extortion, exorbitant rates and similar abuses."

Further, in the case at bar the testimony of a witness for the defendant clearly indicated the favorable conditions which enabled the ticket brokers to practice extortion and to establish a monopoly.

> "Q. If these people did not get these tickets from you in this way, how would they get them, they would have to go to the box office? A. No, sir. *The best they could get for any show is the fifteenth or sixteenth row*" (Record, p. 10, fol. 19).
>
> "Q. There are thirty offices where you can buy tickets from ticket brokers? A. Yes, sir.
>
> "Q. And they are controlled by how many people? A. Probably a dozen or fifteen" (Record, p. 14, fol. 25).

Therefore, if "abuses" have existed for a long time, if the "existence of extortion * * * is widely recognized," if there is "evil flowing from this business" which "should be corrected," is it not a legitimate exercise of the police power for the legislature to adopt a remedy reasonable and appropriate to correct the "evil" the "abuses" and "the extortion" associated with the business of theatre ticket brokers? How can such an exercise of the police power be said to deprive any person of liberty or property without due process of law or deny to any person the equal protection of the law?

The answer of the courts is that there has been no interference with the Fourteenth Amendment in such a case.

The following classic statement is given by Judge Field in *Barbier* v. *Connolly* (113 U. S. 27, 31, 32):

> "The Fourteenth Amendment, in declaring that no State shall deprive any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws, undoubtedly intended not only that there should be no arbitrary deprivation of life or liberty, or arbitrary spoliation of property, but that equal protection and security should be given to all under like circumstances in the enjoyment of their personal and civil rights; that all persons should be equally entitled to pursue their happiness and acquire and enjoy property; that they should have like access to the courts of the country for the protection of their persons and property, the prevention and redress of wrongs, and the enforcement of contracts; that no impediment should be interposed to the pursuits of any one except as applied to the same pursuits by others under like circumstances; that no greater burdens should be laid upon one than are laid upon others in the same calling and condition, and that in the administration of criminal justice no difference or higher punishment should be imposed upon one than such as is prescribed to all for like offenses. *But neither the amendment—broad and comprehensive as it is—nor any other amendment, was designed to interfere with the power of the State, sometimes termed its police power, to prescribe regulations to promote the health, peace, morals, education, and good order of the people, and to legislate so as to increase the industries of the State, develop its resources, and add to its wealth and prosperity.*" (Italics ours.)

The language of the Court in *Powell* v. *Pennsylvania* (127 U. S. 678, 683) was:

> "It is contended that the last statute is void in that it deprives all coming within its provisions of rights of liberty and property without due process of law, and denies to them the equal protection of the laws; rights which are secured by the Fourteenth Amendment to the Constitution of the United States.
>
> "It is scarcely necessary to say that *if this statute is a legitimate exercise of the police power of the State for the protection of the health of the people, and for the prevention of fraud, it is not inconsistent with that Amendment;* for it is the settled doctrine of this court that, as government is organized for the purpose, among others, of preserving the public health and the public morals, it cannot divest itself of the power to provide for those objects; and that the Fourteenth Amendment was not designed to interfere with the exercise of that power by the States." (Italics ours.)

In *People* v. *Budd* (117 N. Y. 1; affd. 143 U. S. 517) the main question was whether the legislation fixing the maximum charge for elevating grain was valid and constitutional. At page 7 the Court stated:

> "This court has recently, in several notable instances, vindicated the rights of individuals against unjust and arbitrary legislation, restraining freedom of action or imposing conditions upon private business, not warranted by the Constitution. * * * But the very existence of government presupposes the right of the sovereign power to prescribe regulations demanded by the general welfare for the common protection of all.

> This principle inheres in the very nature of the social compact. The protection of private property is one of the main purposes of government, but no one holds his property by such an absolute tenure as to be freed from the power of the legislature to impose restraints and burdens required by the public good, or proper and necessary to secure the equal rights of all."

In *Terrace* v. *Thompson* (263 U. S. 197), the Court in discussing the Anti-Alien Land Law of the State of Washington, at pages 216, 217, said:

> "The Fourteenth Amendment, as against the arbitrary and capricious or unjustly discriminatory action of the State, protects the owners in their right to lease and dispose of their land for lawful purposes and the alien resident *in his right to earn a living by following ordinary occupations of the community, but it does not take away from the State those powers of police that were reserved at the time of the adoption of the Constitution.* • • • And in the exercise of such powers the State *has wide discretion* in determining its own public policy and *what measures are necessary for its own protection* and properly to promote the safety, peace and good order of its people." (The italics ours.)

**b.** As the prevention of the "extortion" and the "abuses" connected with the business of theatre ticket brokers came within the scope of the police power and the situation presented a reasonable necessity for the imposition of restraint, the next question presented is whether the remedies adopted by the legislature to restrain these evils were appropriate and reasonably necessary to accomplish the purpose designed.

An examination of the various attempts to prevent the evils of ticket selling clearly indicates that the present act was not a hurried piece of legislation.

It is obvious from a reading of the statute that it was only passed after a deliberate consideration of the evils to be checked and after careful selection of a constitutional remedy, to correct present abuses.

In particular, sections 167 and 174 of the act manifest a purpose on the part of the Legislature through the exercise of the police power—so far as possible within constitutional limitations—to protect the "public against fraud, extortion, exorbitant rates and similar abuses" connected with the business of ticket selling.

In a recent case in Wisconsin, the Court after a consideration of a number of cases in that state succinctly stated the Constitutional limitations upon the exercise of the police power as follows:

> "Those cases established the principle that whether a given situation presents a legitimate field for the exercise of the police powers placing restraints upon the use of property or upon personal conduct depends upon whether the situation presents a reasonable necessity for the imposition of restraint in order to promote the public welfare, and whether the means adopted bear a reasonable relation to the end sought to be accomplished."
>
> *State* v. *Harper*, 196 Northwestern Reporter 451, 453 [Wis.].

The test as to whether a statute can be upheld as a valid exercise of the police power is expressed as follows in *Purity Extract Co.* v. *Lynch* (226 U. S. 192, 204):

> "The inquiry must be whether considering the end in view, the statute passes the bounds of reason and assumes the character of a mere arbitrary fiat."

The language of the Court in *People* v. *Charles Schweinler Press* (214 N. Y. 395, 407) was:

> "The legislature was justified in preventing any such evils as those which were outlined, both real and fairly to be anticipated, by any legislation which reasonably tended to prevent them, and it had a wide discretion in formulating the means which it would adopt to these means."

In the *German Alliance Ins. Co.* v. *Kansas* (233 U. S. 389, 418), the Court said:

> "A citation of cases is not necessary, nor for the general principle that a discrimination is valid if not arbitrary, and arbitrary in the legislative sense, that is outside of that wide discretion which a legislature may exercise. A legislative classification may rest on narrow distinctions. Legislation is addressed to evils as they may appear, and even degrees of evil may determine its exercise."

In *Lawton* v. *Steele* (152 U. S. 133, 137) the following tests are given:

> "To justify the State in thus interposing its authority in behalf of the public, it must appear, first, that the interests of the public generally, as distinguished from those of a particular class, require such interference;

> and, second, that the means are reasonably necessary for the accomplishment of the purpose, and not unduly oppressive upon individuals."

In Point I of this brief, it is submitted, ample authority is given to uphold the validity of the provision requiring ticket sellers to obtain a license. Likewise, it is submitted that the price restriction feature is valid under the police power.

The chief evil associated with the business of theatre ticket brokers seems to be "extortion", "extortionate prices."

The Court below states:

> "Without unnecessarily multiplying quotations from opinions of the courts, we may point out that in *Collister* v. *Hayman* (183 N. Y. 250, 254) this court stated: 'A ticket speculator is one who sells at an advance over the price charged by the management. Speculation of this kind frequently leads to abuse, especially when the theatre is full and but few tickets are left, so that extortionate prices may be exacted.' "
>
> *People* v. *Weller*, 237 N. Y. 316, 327.

At pages 327 and 328 the language of the Court is:

> "The same respect for individual liberty, which should ordinarily deter the legislature from an attempt to restrict freedom, might under special circumstances impel the legislature to seek a remedy for conditions which, unless controlled, *will leave the patrons of the theatre* 'to the mercy of speculators' " (Italics ours).

See also,

*Opinion of Justices to Senate*, 247 Mass. 589, 595-596.

When the public is subjected to "extortionate prices" what remedy is more appropriate than a price restriction?

Does not such a legislative provision reasonably tend to prevent the evils suffered by the public?

*People* v. *Charles Schweinler Press*, 214 N. Y. 395, 406.

Do not the "means adopted bear a reasonable relation to the end sought to be accomplished"?

*State* v. *Harper*, 196 Northwestern Reporter 451, 453 [Wis.].

Is there any doubt "that the means are reasonably necessary for the accomplishment of the purpose"?

*Lawton* v. *Steele*, 152 U. S. 133, 137.

*For this recognized evil has any one been able to suggest an effective remedy other than a restriction of the price?*

Why is there "extortion" and "extortionate prices" in the conduct of the business by theatre ticket agents? Why are there conditions which, unless controlled, will leave the patrons of the theatres "to the mercy of speculators"? Is it not because there is a virtual monopoly in the sale of all desirable tickets which are not back

of the "fifteenth or sixteenth row" owing to the business being controlled by "Probably a dozen or fifteen?"

The existence of a virtual monopoly gives the legislature power to regulate rates (*People* v. *Budd*, 117 N. Y. 1, 26, 27; affd. 143 U. S. 517; *People ex rel. Durham R. Corp.* v. *La Fetra*, 230 N. Y. 429, 445).

In *Spring Valley Water Works* v. *Schottler* (110 U. S. 347, 354), it was said:

> "That it is within the power of the government to regulate the prices at which water shall be sold by one who enjoys a virtual monopoly only of the sale, we do not doubt."

That the price restriction remedy is a new one is no reason for claiming its invalidity.

In *People ex rel. Durham R. Corp.* v. *La Fetra* (230 N. Y. 429, 446), it is stated:

> "Novelty is no argument against constitutionality. Changing economic conditions, temporary or permanent may make necessary or beneficial the right of public regulation."

See, also, *German Alliance Ins. Co.* v. *Kansas*, 233 U. S. 389, 409; *Noble State Bank* v. *Haskell*, 219 U. S. 104.

The statute not only does not deprive the defendant of liberty and property without due process of law, but further it does not deny him equal protection of the law as compared with "clerks and bookkeepers," "shoemakers and tailors," "carpenters and brieklayers". In the case of the theatre ticket sellers, there were "ex-

tortion" and "extortionate prices", and unless the price could be controlled patrons would be left "to the mercy of speculators". See *Collister* v. *Hayman*, 183 N. Y. 250, 254. These abuses could not be prevented by competition, because as to the most desirable seats there was a practical monopoly.

As to the other classes mentioned such as the "shoemakers and tailors", there was no monopoly, the price was fixed "over the counters", "by what Adam Smith calls the higgling of the market" (See *German Alliance Ins. Co.* v. *Kansas*, 233 U. S. 389, 416).

By reason of "extortion", "extortionate prices" and a virtual monopoly, the legislature was justified in legislating as to theatre ticket sellers as a separate class. There was no unconstitutional discrimination. The statute "secures equal protection to all in the enjoyment of their rights under like circumstances" (See *Terrace* v. *Thompson*, 263 U. S. 197, 218).

The rules to determine whether there has been an arbitrary classification and consequently a denial of equal protection of the laws are stated as follows in *Lindsley* v. *Natural Carbonic Gas Co.* (220 U. S. 61, 78, 79):

> "1. The equal protection clause of the Fourteenth Amendment does not take from the State the power to classify in the adoption of police laws, but admits of the exercise of a wide scope of discretion in that regard, and avoids what is done only when it is without any reasonable basis and therefore is purely arbitrary. 2. A classification having some reasonable basis does not offend against that clause merely because it is not made with

> mathematical nicety or because in practice it results in some inequality. 3. When the classification in such a law is called in question, if any state of facts reasonably can be conceived that would sustain it, the existence of that state of facts at the time the law was enacted must be assumed. 4. One who assails the classification in such a law must carry the burden of showing that it does not rest upon any reasonable basis, but is essentially arbitrary."

Applying these rules to the facts in the case at bar, it is evident that there was a "reasonable basis" for the statute. There was a statement of facts existing which sustained the classification. Lastly, the plaintiff-in-error as to this classification was under the "burden of showing that it does not rest upon any reasonable basis."

The statute cannot be successfully attacked because "some cases which might have been included are omitted, for police legislation may rest on narrow distinctions."

> *People* v. *Charles Schweinler Press*, 214 N. Y. 395, 407.

See also

> *German Alliance Ins. Co.* v. *Kansas*, 233 U. S. 389, 418.

It is apparent from the evidence in this case that the legislature might have been justified in also protecting the public against the acts of the producing managers. But the statute "does not prohibit the producing manager from charging the public all that the public will pay, but leaves the regulation of price between producer and con-

sumer to the free play of supply and demand." See *People* v. *Weller*, 237 N. Y. 316, 330.

Whether the legislature should have attempted to cure all the evils that have grown out of the sale of theatre tickets, or only endeavor to check these evils where they affected the public in the greater degree, was for the legislature alone to decide. In the language of *German Alliance Ins. Co.* v. *Kansas* (233 U. S. 389, 418):

> "Legislation is addressed to evils as they may appear, and even degrees of evil may determine its exercise."

This doctrine is expressed in *Keokee Coke Co.* v. *Taylor* (234 U. S. 224, 227) as follows:

> "It is more pressed that the act discriminates unconstitutionally against certain classes. But while there are differences of opinion as to the degree and kind of discrimination permitted by the Fourteenth Amendment, it is established by repeated decisions that a statute aimed at what is deemed an evil, and hitting it presumably where experience shows it to be most felt, is not to be upset by thinking up and enumerating other instances to which it might have been applied equally well, so far as the Court can see. That is for the legislature to judge unless the case is very clear."

In the case at bar, a classification was made by the legislature to meet an existing condition, not an imaginary or improbable one. The classification has been upheld by the Court of Appeals as proper to meet such conditions. Likewise, it is submitted the classification should be sustained by this court as there is no cogent reason that

requires its extension to include "others whom it leaves untouched."

*Williams* v. *Arkansas*, 217 U. S. 79, 90.

**c.** *The police power expands to meet new conditions.*

One of the chief attributes of the police power is that it is flexible and adaptive, that it expands to meet new conditions and keeps pace with new developments (*Enbank* v. *Richmond*, 226 U. S. 137, 142; *Hadacheck* v. *Los Angeles*, 239 U. S. 394, 410).

In *Holden* v. *Hardy* (169 U. S. 366), in deciding that a statute of Utah providing that the "period of employment of workingmen in all underground mines or workings shall be eight hours per day" was a valid exercise of the police power of the State, the Court said, at page 385, that "in passing upon the validity of state legislation under that amendment [the Fourteenth], this Court has not failed to recognize the fact that the law is, to a certain extent, *a progressive science*" (Italics ours). See also *Noble State Bank* v. *Haskell*, 219 U. S. 104, 110.

The rights of the community are the supreme consideration—to which those of the individual must yield. As said by the Court in *Union Dry Goods Co.* v. *Georgia P. S. Corp.* (248 U. S. 372, 375):

> "That private contract rights must yield to the public welfare, where the latter is appropriately declared and defined and the two conflict, has been often decided by this court."

We find many exercises of this power in recent times which formerly might have been considered doubtful. Thus, we find that it has been held to authorize restrictions on the hours of labor (*Muller* v. *Oregon*, 208 U. S. 412; *People* v. *Schweinler Press*, 214 N. Y. 395, overruling, it seems, *People* v. *Williams*, 189 N. Y. 131; *Ritchie* v. *Wayman*, 244 Ill. 509; *State* v. *Bunting*, 71 Oregon 259; aff'd. 243 U. S. 426; *Hawley* v. *Walker*, 232 U. S. 718).

A striking instance of this broadening of the police power and a departure from earlier decisions is the case of *Klein* v. *Maravelas* (219 N. Y. 383, 384-386) where the Court, construing the sales in bulk law said the prior case of Wright *v.* Hart (182 N. Y. 330) was *"wrong"*. The latter case had been decided only about eleven years before *Klein* v. *Maravelas, supra.*

In *Klein* v. *Maravelas*, at pages 384-386, the Court said:

> "This case makes it necessary for us to say whether the so-called sales in bulk law is a constitutional enactment (Personal Property Law, §44, L. 1914, ch. 507; Cons. Laws, ch. 41). A very similar law was enacted in 1904 (L. 1904, ch. 569). In *Wright* v. *Hart* [1905], 182 N. Y. 330), we held it to be unconstitutional. We said that it violated the federal constitution in denying to merchants the equal protection of the laws. We said that it violated both the federal and the state constitution in imposing arbitrary restrictions upon liberty of contract. That decision was reached by a closely divided court. Three judges dissented. There were strong dissenting opinions by Judge VANN and Chief Judge CULLEN.

Since *Wright* v. *Hart* was decided, the validity of like statutes has been upheld in two cases by the United States Supreme Court (*Lemieux* v. *Young*, 211 U. S. 489; *Kidd, Dater & Price Co.* v. *Musselman Grocery Co.*, 217 U. S. 461). Objection to this statute on the ground of conflict with the federal constitution has thus been removed. We have still to determine, however, whether there is any conflict with our state constitution; and that requires us to say whether we shall adhere to our decision in *Wright* v. *Hart*.

We think it is our duty to hold that the decision in *Wright* v. *Hart* is wrong. The unanimous or all but unanimous voice of the judges of the land, in federal and state courts alike, has upheld the constitutionality of these laws. At the time of our decision in *Wright* v. *Hart*, such laws were new and strange. They were thought in the prevailing opinion to represent the fitful prejudices of the hour (*Wright* v. *Hart*, *supra*, at p. 342). The fact is that they have come to stay, and like laws may be found on the statute books of every state." • • •

"In such circumstances we can no longer say, whatever past views may have been, that the prohibitions of this statute are arbitrary and purposeless restrictions upon liberty of contract (*Rast* v. *Van Deman & Lewis Co.*, 240 U. S. 342, 366; *Noble State Bank* v. *Haskell*, 219 U. S. 104; *Otis* v. *Parker*, 187 U. S. 606). *The needs of successive generations may make restrictions imperative to-day which were vain and capricious to the vision of times past* (Italics ours) (*People* v. *Schweinler Press*, 214 N. Y. 395)."

This flexibility of the police power to meet new conditions whereby new regions are added to its domain, is also illustrated in the expansion of the definition of a public use.

In a recent case in Minnesota it was held that "the establishment of a municipal fuel yard is a public purpose."

*Central Lumber Co.* v. *City of Waseca,* 152 Minn. 201; 188 Northwestern 275.

In that case, the Court says:

> "Economic and industrial conditions are not stable. Times change. Many municipal activities, the propriety of which is not now questioned, were at one time thought, and rightly enough so, of a private character. The constitutional provision that taxes can be levied only for a public purpose remains; but conditions which go to make a purpose public change."

This tendency is also illustrated in *Shoemaker* v. *United States* (147 U. S. 282, 297), where Judge Shiras said:

> "In the memory of men now living, a proposition to take private property, without the consent of its owner, for a public park, and to assess a proportionate part of the cost upon real estate benefited thereby, would have been regarded as a novel exercise of legislative power. * * * It is said in Johnson's Cyclopaedia, that the Central Park of New York was the first place deliberately provided for the inhabitants of any city or town in the United States for exclusive use as a pleasure-ground, for rest and exercise in the open air."

**d.** ***To hold that the statute is invalid is to hold that the State is powerless to protect the public against recognized abuses.***

An examination of the various attempts to prevent the evils of ticket selling clearly indicates that the present act was not a hurried piece of legislation.

It is obvious from a reading of the statute that it was only passed after a deliberate consideration of the evils to be checked and after careful selection of a constitutional remedy to correct present abuses.

In particular, sections 167 and 174 of the act manifest a purpose on the part of the Legislature through the exercise of the police power—so far as possible within constitutional limitations—to protect the "public against fraud, extortion, exorbitant rates and similar abuses" connected with the business of ticket selling.

It is submitted that to hold that the statute in the case at bar is unconstitutional is to admit that however injurious the abuses of the business of ticket selling and however righteous may be the indignation of the public at these abuses, the police power of the State cannot deal with the evil.

The evil is not new. As already indicated abuses similar to those described in the case at bar existed in ancient Athens, but the Athenians devised an effective remedy.

See "The Attic Theatre" by A. E. Haigh, at page 330.

Over two thousand years thereafter a like situation exists in this State. Is there no remedy?

Is the Legislature so powerless that it cannot safeguard "the public against fraud, extortion, exorbitant rates and similar abuses"?

> "Either the rights of property and contract must when necessary yield to the public convenience, advantage and welfare, or it must be found that the state has surrendered one of the attributes of sovereignty for which governments are founded and made itself powerless to secure to its citizens the blessings of freedom and to promote the general welfare."
>
> *People ex rel. Durham R. Corp.* v. *La Fetra*, 230 N. Y. 429, 443.

## IN CONCLUSION.

**The judgment should be affirmed.**

Respectfully submitted,

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